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## Inheritance and Inconsistency

ADAM J. HIRSCH\*

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\*Professor of Law, Florida State University. M.A. 1979, J.D. 1982, Ph.D. 1987 Yale University. For many helpful comments, my thanks go to Rob Atkinson, Jesse Dukeminier, Larry Garvin, John Gaubatz, Robert W. Gordon, John Langbein, William McGovern, Jr., Mark Seidenfeld, and Lawrence Waggoner, together with auditors at faculty colloquia at the University of California at Davis School of Law, the University of California, Hastings College of the Law, the University of Colorado School of Law, the Samford University, Cumberland School of Law, and the University of San Diego School of Law. Thanks also to Lisa Forbes and Gayle Delman for their able and affable research assistance. This essay is dedicated to the memory of Arthur Leff, teacher and scholar *sans pareil*.

## I. INTRODUCTION

Analysts of legal doctrine need to put aside their telescopes. Too many scholars are devoting too many pages to the scrutiny of pinpoint problems in the law, grinding and regrinding their analytical lenses. In the process, inevitably, they have lost track of matters farther from home, matters of the conceptual juxtaposition of different fields of law and even of separate doctrines *within* individual fields. What scholars perceive when they squint at the exquisite details of legal rules is often a source of wonder.<sup>1</sup> What they would discern if they peered out at the wider span of the legal heavens, however, might well alarm them.

In his satire of Socratic teachings, *The Clouds*, Socrates's contemporary, Aristophanes, provided an apt commentary on the modern legal cosmos: "Whirl is king, and has ousted Zeus."<sup>2</sup> Many legal doctrines today appear jarringly, carelessly, almost randomly out of harmony with one another. The chaos has gone largely undetected and hence has continued to swirl unimpeded. But it is there to be seen, if only we care to look. To observe the chaos, one has simply to forsake all instruments of magnification and scan the skies with the naked eye.

In this Article, I take up the problem of *structural consistency of law*. By this I mean the symmetry or asymmetry of doctrinal treatment between structurally analogous (or "parallel") legal issues. Oddly, it is a concern that has provoked little curiosity within the realm of jurisprudence. The theoretical antithesis of the problem of structural inconsistency, the so-called fallacy of the transplanted category, whereby structurally *different* legal issues are sometimes treated *alike* because of superficial coincidences of nomenclature, has aroused a bit of interest over the years.<sup>3</sup> The more widespread phenomenon of courts and

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<sup>1</sup> Having devoted a daunting 833 pages to the subject of the Rule Against Perpetuities, John Chipman Gray crowed that his subject was "concatenated with almost mathematical precision." JOHN C. GRAY, *THE RULE AGAINST PERPETUITIES* § 869, at 757 (Roland Gray ed., 4th ed. 1942) (1886). See also J.M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1 (1986). Which is not, of course, to say that there is no such thing as microscopic muddle. See, e.g., Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757-58 (1994).

<sup>2</sup> ARISTOPHANES, *THE CLOUDS* 307 (W.J.M. Starkie trans., MacMillan & Co. 1911) (423 B.C.).

<sup>3</sup> On this phenomenon, see WALTER W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 154-93 (1942); Moffatt Hancock, *Fallacy of the Transplanted Category*, 37 CANADIAN B. REV. 535 (1959). Noting its occurrence in connection with the transplantation of fiduciary law, for instance, see Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 804-08 (1983); John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207, 209-13.

legislatures treating similar legal issues *unlike* due to the *absence* of semantic overlap or other cues or recognition of theoretical affinities, has garnered far, far less.

In the pages following, I will attempt to demonstrate the extent of structural inconsistency within a single category of law: namely, the law of wills and inheritance of property. It is an ancient corner of the legal universe, one that has had centuries to settle into logically coherent patterns and orbits. Yet it is an area that continues to display—noticeably, one might even say remarkably—a nebulous, unguided quality.<sup>4</sup> Even recent efforts to codify the field of inheritance law have failed to reduce the area to better structural order. One might have expected the National Conference of Commissioners on Uniform State Laws to intercede as a *deus ex machina* to fashion order out of chaos. It produced a Uniform Probate Code, whose substantive articles have been newly revised from top to bottom, with the ostensible purpose of “simplify[ing] and clarify[ing] the law concerning the affairs of decedents.”<sup>5</sup> Alas, the Conference (in both of its incarnations) has left much of the chaotic doctrine intact. In a few instances the Conference has even proven a *diablo ex machina*, aggravating the law’s disharmony.<sup>6</sup>

This study may be read as a free-standing, and free-wheeling, critique of the state of inheritance law in America today. It is intended, however, to be both more and less than that. The aspects of inheritance law addressed here are selective, comprising an assortment of doctrines that, when compared, turn out to display sharp contrasts. But in order to place those comparisons in some context, we will have to develop an analytic framework for mapping the

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<sup>4</sup> I am not the first commentator to render such a judgment. Some twenty years ago, Professor Gaubatz complained that “the lack of relationship between the technical rules of law and the goals sought to be achieved by those rules” was a problem “particularly prevalent” in inheritance law. Gaubatz proposed that its rules be loosened to permit greater recourse to equity. See John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 498–500 (1977).

<sup>5</sup> UNIF. PROBATE CODE § 1-102(b)(1) (1993). This guiding principle appeared in the original version of the Uniform Probate Code, promulgated in 1969. It was incorporated into the revised version of the Code, completed in 1990, which makes no amendments to the “general provisions” of the Code, found in Part 1 of Article 1, or to other, procedural articles of the Code. See also *id.* art. 2 prefatory note (discussing the general aims of the drafters of the revised Uniform Probate Code in 1990). A precursor was the Model Probate Code, developed an academic generation earlier by Professors Simes and Bayse under the sponsorship of the American Bar Association. See generally LEWIS M. SIMES & PAUL E. BAYSE, PROBLEMS IN PROBATE LAW, INCLUDING A MODEL PROBATE CODE (1946) [hereinafter MODEL PROBATE CODE].

<sup>6</sup> But see *infra* note 39 for one notable effort by the Commissioners to bring structural symmetry to inheritance law.

problems of inheritance law that may be of some use in its own right. And the comparisons thus drawn double as a case-study of the jurisprudential phenomenon of structural inconsistency in law, which remains the larger object of my inquiries.

The analysis will progress in stages. Part II examines doctrines connected with the formalization of wills. Part III turns to doctrines involving the construction of wills. Having told the tale, we shall proceed in Part IV to dwell upon its morals: herein we treat the problem of structural inconsistency of law in the abstract, as an attribute of the legal system that wants sufficient theoretical attention and whose very existence has not even been fully appreciated by lawmakers.

## II. TESTAMENTARY FORMALIZATION

### A. Theoretical Prologue

Inheritance law stands on ceremony. In order effectively to create a will in the United States, the testator must not only express her substantive intentions but also observe a number of procedural niceties for due execution. It was not ever thus. In colonial times, settlers were content to give effect to nuncupative (oral) wills or even to depositions by friends or family concerning the decedent's dispositive preferences as expressed to them casually. The court then ordered distribution "according to the minde of the deceased."<sup>7</sup> Nowadays, by contrast, every state has enacted a Statute of Wills requiring that testamentary instruments be in writing,<sup>8</sup> signed by the testator,<sup>9</sup> witnessed by at

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<sup>7</sup> George L. Haskins, *The Beginnings of Partible Inheritance in the American Colonies*, 51 YALE L.J. 1280, 1286-88 (1942) (quoting contemporary document, without citation, at 1288). In Great Britain, nuncupative wills disposing of real property were valid until 1677 and those disposing of personal property until 1837; Britain's American colonies began enacting comparable provisions in the eighteenth century. See *infra* note 44. For a recent survey of the historical development of testamentary formalities in England, citing to the principal studies, see C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism* (pts. 1 & 2), 43 FLA. L. REV. 167, 187-204, 599 (1991). See also Brenda Danet & Bryna Bogoch, *From Oral Ceremony to Written Document: The Transitional Language of Anglo-Saxon Wills*, 12 LANGUAGE & COMM. 95 (1992). Despite the relative informality of early English and American wills, rituals have played a prominent part in western legal culture since classical times when they were, if anything, even more pervasive than they are today. See Peter M. Tiersma, *Rites of Passage: Legal Ritual in Roman Law and Anthropological Analogues*, 9 J. LEGAL HIST. 3 (1988).

<sup>8</sup> In a few jurisdictions, nuncupative wills are still permitted under very limited

least two subscribing witnesses (who in some jurisdictions must be present simultaneously) and, in a few lingering jurisdictions, "published," that is, acknowledged in an oral address as the testator's last will.<sup>10</sup> By tradition, these formalities have been strictly enforced.<sup>11</sup>

What purposes are served by obliging the testator to follow these procedures? In part, they function to provide the probate court with clear evidence of the authenticity and substance of the estate plan submitted to it as the testator's. Given that the testator herself is unavailable to verify those facts,<sup>12</sup> the probate court has need of a reliable alternative;<sup>13</sup> a witnessed, signed writing meets that end.<sup>14</sup>

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circumstances. See WILLIAM M. MCGOVERN, JR. ET AL., *WILLS, TRUSTS, AND ESTATES* § 4.5, at 177-78 (1988). A provision validating nuncupative wills in special cases appeared in the Model Probate Code and was also included in an early draft of the Uniform Probate Code, but it was omitted from the version finally adopted by the Commissioners. See MODEL PROBATE CODE, *supra* note 5, § 49; UNIF. PROBATE CODE § 6 (First Tentative Draft, Aug. 2-7, 1965); cf. UNIF. PROBATE CODE, *supra* note 5, § 2-502; *id.* app. VII, § 2-502 (pre-1990 art. 2).

<sup>9</sup> Some states further require that the signature appear at the *end* of the testamentary instrument.

<sup>10</sup> For references to state law, see *infra* note 35.

<sup>11</sup> As one opinion put the matter a mite indelicately, "[i]n the case of execution the courts do not consider the intent of the testator, but that of the Legislature." Twilley v. Durkee, 211 P. 668, 674 (Colo. 1922). On the requirement of strict compliance (upon which there has always been some difference of opinion), see 2 WILLIAM H. PAGE, *ON THE LAW OF WILLS* § 19.4, at 67-68 (William J. Bowe & Douglas H. Parker eds., rev. ed. 1960 & Supp. 1996).

<sup>12</sup> Perhaps *unavailable* is the wrong word to use, for the testator's testimony is also inadmissible whilst she lives: Ante-mortem probate of wills is barred in the vast majority of American jurisdictions—a policy Professor Langbein has condemned as a "worst evidence rule." John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2044 (1994) (book review). For a recent discussion, see Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990). One may go a step further and remark that were ante-mortem probate permitted, the formalities of will execution could be dispensed with entirely!

<sup>13</sup> The testimony of survivors is not a reliable alternative. *E.g.*, Estate of Utterback, 521 A.2d 1184, 1188 (Me. 1987) ("Testimony concerning statements of intent made by a testator . . . is almost always self-serving and rarely objective.").

<sup>14</sup> *E.g.*, Lorraine v. Grover, 467 So. 2d 315, 318 n.6 (Fla. Dist. Ct. App. 1985) ("[T]he avowed purpose of the Statute of Wills [is] to guard against fraud, but also . . . [to close] the door to 'the fabled triplets of conjecture, speculation and surmise.'"). The original British statute requiring that wills be written, signed, and witnessed likewise expressed as its purpose the "prevention of many fraudulent Practices which are commonly endeavored to be upheld by Perjury. . . ." An Act for Prevention of Frauds and Perjuries, 29 Car. 2 c. 3 (1677) (Eng.) (preamble). For academic discussions, see Ashbel G. Gulliver & Catherine J.

This aspect of will execution is fairly obvious, but the process also serves a more subtle, though no less important, end: namely, to clarify what exactly the testator meant to do when she composed the words that are alleged to comprise her will. As modern linguistic theory recognizes, human language can function to effect several different purposes. People use language to communicate—indeed, that is its ordinary, day-to-day function—but they also use language, on rarer occasion, *to do things*—that is, to accomplish, simply by virtue of the recitation, some change of their worldly state. The words “I promise”—or, “I do”—are examples of statements that have been turned to this purpose. Once the individual speaks them, her life will never be the same again. And the execution of a will also involves (as the linguists say) this *performative* use of words.<sup>15</sup> Once a will is deemed effective, a court will enforce its terms; the legal status of the beneficiaries adjusts accordingly. But because lay persons more frequently use words for communicative than for performative purposes, it falls upon authorities carefully to differentiate those instances in which persons *intend* their words to carry legal consequences from those in which they do not.

Now, how can the legal system distinguish between the two? One way is by altering the form of the words themselves. The stylized, often redundant, linguistic formulae found within testamentary instruments,<sup>16</sup> like those reserved for other legally significant occasions, serve to set them apart from everyday

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Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 6-9 (1941); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 492-93 (1975). A related function of will execution is to protect the testator from duress or undue influence, thereby ensuring that the evidence presented in the testamentary dossier accurately reflects what the testator wished to say. In this regard, the witnesses assume a role that would otherwise be played by officers of the court, were the testator able personally to testify. For discussions, see Gulliver & Tilson, *supra*, at 9-13; Langbein, *supra*, at 496-97. For an early recognition, see HENRY SUGDEN, AN ESSAY ON THE LAW OF WILLS 178-79 app. (London 1837).

<sup>15</sup> For the seminal theoretical discussion of this use of language, see J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (F.O. Urmson & Marina Sbisa eds., 2d ed. 1975) (based on the William James Lectures, 1955). Austin distinguished *performative* words from *constative* words (the latter term referring to mere communication). *Id.* at 4-7. Austin's most renowned student, John Searle, prefers to term performative words as *speech acts*. See JOHN R. SEARLE, SPEECH ACTS (1969); see also JOHN R. SEARLE, EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS (1979) [hereinafter EXPRESSION AND MEANING]; John R. Searle, *How Performatives Work*, 12 LINGUISTICS & PHIL. 535 (1989).

<sup>16</sup> Among the conventional pleonasms: I make my “last will and testament.” I “give, devise, and bequeath . . .,” including “all the rest, residue, and remainder of my estate . . . .” And so on.

speech.<sup>17</sup> (Indeed, the very setting apart of such speech is recognized by popular terminological distinctions—hence, we exchange not wedding words, but wedding *vows*.<sup>18</sup>) Such formulae, though, have drawn criticism, at least in the context of legal discourse. Norman Dacey, in his best-selling do-it-yourself estate planning manual, *How to Avoid Probate!*, railed against the “ponderous phrases and legalistic mumbo jumbo” that continues to pepper modern wills.<sup>19</sup> (He nonetheless retained some of the traditional verbiage in his own model wills, as he explained sarcastically, so that the reader “won’t feel cheated.”<sup>20</sup>) Other, heavier scholars have weighed in with similar criticisms. Fred Rodell, in a classic indictment of the legal profession, dismissed legal language as “solemn hocus-pocus,” “reading as though [it] had been translated from the German by someone with a rather meager knowledge of English.”<sup>21</sup> I would submit that Rodell and other exponents of the “Plain English” movement in legal language have missed the point.<sup>22</sup> It is useful for legally performative statements to employ a distinctive vernacular precisely because this discourse, unlike ordinary discourse, *does* accomplish “hocus-pocus.”<sup>23</sup> The switch to a

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<sup>17</sup> Judge Posner has made the point in passing. See RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 272 (1988). For an early recognition, see JOHN PROFFATT, *THE CURIOSITIES AND LAW OF WILLS* 51 (photo. reprint William S. Hein & Co. 1989) (San Francisco 1877) (“As if to appropriately mark the solemnity of the act, and to declare a consciousness of it, it was the usual way to commence a will . . . with ‘In the name of God, Amen’ . . .”). For a theoretical discussion, see AUSTIN, *supra* note 15, at 56–93.

<sup>18</sup> Alternatively, the word *word* in lay discourse can be rendered performative (or at least express an intent to be performative) with a slight embellishment, *viz.*, “You have my word!” or, in a more stylized version, “My word is my bond!”

<sup>19</sup> NORMAN F. DACEY, *HOW TO AVOID PROBATE—UPDATED!* 555 (1980).

<sup>20</sup> *Id.* Dacey’s sarcasm held more truth than he knew: having grown accustomed to a dichotomy between technical legal language and non-technical communicative language, some lay persons believe that a document cannot be legally performative *unless* it contains technical words. See Lawrence X. Cusack, *The Blue-Pencilled Will: What’s Wrong with a Will in Plain English?*, 118 TR. & EST., Aug. 1979, at 33, 34.

<sup>21</sup> FRED RODELL, *WOE UNTO YOU, LAWYERS!* 185 (1939). See also *id.* at 7–20, 183–202.

<sup>22</sup> For the gospel of Plain English, see DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* (1963); Robert W. Benson, *The End of Legalese: The Game Is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519 (1984–85), and with respect to wills, see, by the aptly named, Thomas S. Word, Jr., *A Brief for Plain English Wills and Trusts*, 14 U. RICH. L. REV. 471 (1980). The crusade is an old one: early champions in America (where the move converged with the post-revolutionary campaign to new-model the entire English language) included John Adams and Thomas Jefferson; and in England Jeremy Bentham and, as early as the sixteenth century, Sir Thomas More. See MELLINKOFF, *supra*, at 202–03, 238–56, 261–66.

<sup>23</sup> Rodell goes astray when he continues: “Now it is generally conceded that the

foreign-sounding grammar underscores to the lay person that when she uses *legal* words she is playing with fire. Were plain English adopted instead, this fact might be less clear; like an observer at an auction with a nervous twitch, the lay person might appear to be doing legally significant things when she does not mean to.<sup>24</sup>

Though the words of a will typically follow certain traditions of form, these are not required by law.<sup>25</sup> What lawmakers do insist on is that the testator formalize her words, be they plain-spoken or lawyerly, within an execution ceremony that involves a writing, signature, witnesses, and so forth. And here too, the same policy can be perceived.<sup>26</sup> The arcane minuet of the will-execution ceremony, like the marriage ceremony, serves to impress upon the testator that on this occasion her words will count, that this is no time for idle banter.<sup>27</sup> Whence have scholars referred to the "ritual function" of the Statute

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purpose of language, whether written, spoken, or gestured, is to convey ideas from one person to another." RODELL, *supra* note 21, at 185.

<sup>24</sup> As a matter of law, a will is effective only if the testator envisions it to constitute an instrument of testation; its words are not performative in and of themselves, but only because the testator *intends* them to be so. In practice, however, courts often have no evidence other than the will itself and so must infer (or not) the presence of this intent. See *infra* note 27. For a related linguistic discussion, see AUSTIN, *supra* note 15, at 12-24.

<sup>25</sup> E.g., *Hebden v. Keim*, 75 A.2d 126, 128 (Md. 1950) ("In some legal instruments the use of technical words and phrases is required by the long usage of the law to accomplish particular effect. But the law does not require a testator to use technical words or any particular form of words in his will to convey his intention."); *Dingess v. Drake*, 64 S.E.2d 601, 604 (W.Va. 1951). For an early discussion, see HENRY SWINBURNE, A BRIEF TREATISE OF TESTAMENTS AND LAST WILLES 190a-91 (Photo. reprint 1978) (London 1590).

<sup>26</sup> In an English opinion dating to 1798, the Lord Chancellor called for "the interference of the legislature to prevent . . . the disposing of all a man's fortune [at death by] the most slight and trivial act, attended with much less of form, solemnity, and precision, than any act he could do with regard to any part of his property during his life." *Mathews v. Warner*, 31 Eng. Rep. 96, 106 (Ch. 1798) (Loughborough, C.); see also 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*376 (London 1765-69) (referring to the "solemnity" of will execution introduced by the act of 1677 requiring that wills be written, signed and witnessed). For an early American recognition in a related context, see *Warren v. Lynch*, 5 Johns. 239, 245 (N.Y. Sup. Ct. 1810) (Kent, C.) (noting that the policy underlying seals "consists in giving ceremony and solemnity to the execution of important instruments, by means of which the attention of the parties is more certainly and effectually fixed and frauds less likely to be practiced upon the unwary").

<sup>27</sup> Sometimes, even a ceremony is not enough: some *executed* wills have been contested on the ground that they were not intended to be legally effective. In such cases, courts have divided over whether to admit extrinsic evidence to help determine whether a formalized document was intended to be performative as a will. See MCGOVERN ET AL., *supra* note 8, § 7.1; 1 PAGE, *supra* note 11, § 5.10; Jan E. Rein-Francovich, *An Ounce of*



banter.<sup>27</sup> Whence have scholars referred to the "ritual function" of the Statute of Wills.<sup>28</sup>

So much is accepted wisdom and, moreover, wise: many persons are given to speak and write off the cuff, many persons commit to words tentative *drafts* of their wills and then have second thoughts when the time for inking draws near. To admit into probate informal expressions of a testator's estate plan could often thwart the true intent of the testator. To be sure, a formality requirement also carries in its train some risk of error, in that the will excluded for want of formality could nonetheless accurately reflect intent.<sup>29</sup> But the very

<sup>27</sup> Sometimes, even a ceremony is not enough: some *executed* wills have been contested on the ground that they were not intended to be legally effective. In such cases, courts have divided over whether to admit extrinsic evidence to help determine whether a formalized document was intended to be performative as a will. See MCGOVERN ET AL., *supra* note 8, § 7.1; 1 PAGE, *supra* note 11, § 5.10; Jan E. Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes*, 20 GONZ. L. REV. 1, 5-6 (1984-85).

<sup>28</sup> Gulliver and Tilson coined the phrase. See Gulliver & Tilson, *supra* note 14, at 5-6; Langbein, *supra* note 14, at 494-96. See also, e.g., Estate of Utterback, 521 A.2d 1184, 1188 (Me. 1987) ("... to provide a reliable source of the testator's intent expressed under circumstances where the testator fully understands the significance and permanence of the statements he has reduced to written form"). A related function of ritual is to give the actor a breathing space, so to say, to deliberate before acting, lest she subsequently regret a decision made on the impulse of the moment. This rationale, which Lon Fuller called the "cautionary function" of legal formalities, has been offered to justify the unenforceability of unrationalized donative promises. See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800, 814-15 (1941); see also Melvin A. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 5, 13 (1979). For an early discussion, see 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 907 (Robert Campbell ed., 5th ed. London, John Murray 1885) (1861). This rationale has less application to testamentary transfers, which are ambulatory; the testator will have time to deliberate *after* the will is executed and can always modify her estate plan by codicil, assuming she remains physically and mentally able. On the other hand, knowledge that a will must be elaborately formalized may serve *ex ante* to discourage procrastination resulting in "deathbed wills," common before formalities were required in England, and notoriously poorly planned. This aim was recited in SUGDEN, *supra* note 14, at 235 app.; see also Gulliver & Tilson, *supra* note 14, at 10-11 & n.32 (on the frequency of the problem). Asserting that will formalities also serve psychological purposes, see Gerry W. Beyer, *The Will Execution Ceremony—History, Significance, and Strategies*, 29 S. TEX. L. REV. 413, 419-20 (1987).

<sup>29</sup> See *Windham v. Chetwynd*, 97 Eng. Rep. 377, 381 (K.B. 1757) (Mansfield, J.) (opining that "many more fair wills have been overturned for want of the form, than fraudulent have been prevented by introducing it."); 3 ARTHUR L. CORBIN, ON CONTRACTS § 575, at 380 (rev. ed. 1960 & Supp. 1994) (asserting, by analogy, that contract formalities "may have done more harm than good . . . attempt[ing] to determine justice and truth by a mechanistic device . . . evidencing a distrust of the capacity of courts and juries to weigh

fact that the law demands formalities should function *ex ante* to encourage proper execution and hence yield, in more instances, better evidence both of the substance of the estate plan and of the testator's resolve to put it into legal effect.<sup>30</sup> As a fringe benefit, a formalities requirement also eases administrative processes. It renders more efficient the proof of wills within probate proceedings<sup>31</sup> and generally should discourage litigation over the validity of

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human credibility"). *But see infra* note 120 (asserting the contrary in the context of scriveners' errors).

<sup>30</sup> See *Wright v. Bloom*, 635 N.E.2d 31, 38 (Ohio 1994) (discussing the formalities associated with joint bank accounts). Apart from its *ex ante* effect on the reliability of evidence in probate, a formalities requirement could reflect another, tacit policy: namely, a preference for the distributive scheme mandated by the intestacy statute, absent clear evidence of intent to the contrary. A formalities requirement effectively places upon testators who do wish to deviate from the intestacy scheme the onus of evincing unequivocally their intention to do so. Thus, the drafters of the New York Revised Statutes of 1830 reported in a related context: "We may safely lean in favor of intestacy; since it rarely happens that the dispositions of a disputed will are as just and equitable as those which, in the event of its being set aside, the law provides." Report of Revisers of N.Y. Statutes of 1827-28, *quoted in* W.W. Ferrier, Jr., *Revival of a Revoked Will*, 28 CAL. L. REV. 265, 267 (1940); *see also, e.g., In re Walker's Estate*, 42 P. 815, 818 (Cal. 1895) (requiring strict compliance with the Statute of Wills because "[i]n the absence of any will, the law makes a wise, liberal, and beneficial distribution of the dead man's estate"), *modified*, 42 P. 1082 (Cal. 1896) (*per curiam*); *Reed v. Roberts*, 26 Ga. 294, 300-01 (1858) (requiring strict compliance with the Statute of Wills because "[o]rdinarily, our statute of [intestate] distribution makes the fairest disposition of a dead man's property."). Likewise in Great Britain, "it is true that the proposed regulation [requiring will formalities] may sometimes produce an intestacy, where by the present law a . . . disposition might be upheld: but the distribution . . . in case of intestacy, is a just and fair distribution amongst those who . . . have the strongest claim to participate in the property of the deceased." SUGDEN, *supra* note 14, at 235 app. *But see* *Bosley v. Wyatt*, 55 U.S. 390, 397 (1852) (Taney, C.J.) (given that in America "[t]he property devised is, perhaps, in the greater number of cases, the fruits of the testator's own industry . . . the policy and institutions of the country are adverse to the feudal policy of favoring the heir at the expense of the devisee"). Cf. THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* § 62, at 293 (2d ed. 1953) (questioning the existence of this policy as an explanation for the requirement of strict compliance with will formalities); Langbein, *supra* note 14, at 499-501 (same).

<sup>31</sup> Fuller called this the "channelling function" of legal formalities; as he pointed out, the procedural efficiency of formalities is useful for courts as well as for individual actors who seek low-cost means of ensuring the legal effectiveness of their transactions. See Fuller, *supra* note 28, at 801-03. See also Lawrence Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 370-72; L. Vold, *The Application of the Statute of Frauds under the Uniform Sales Act*, 15 MINN. L. REV. 391, 392-95 (1931) (anticipating the point in the context of contracts). For a judicial discussion in the context of joint bank accounts, see *Wright*, 635 N.E.2d at 37. A related

wills by again reducing the uncertainty of the evidence.<sup>32</sup>

This having been said, questions remain about what manner of form suffices to corroborate testamentary intent. Certainly, the trend of recent days has been to chip away at formal requirements, a trend also reflected in the evolution of the model codes. With some fanfare (but as yet, few adoptions), the revised Uniform Probate Code ends the obligation to comply strictly with the statutory formalities. Courts can excuse formal requirements, hence giving effect to improperly formalized wills, where extrinsic evidence establishes testamentary intent.<sup>33</sup> More quietly, the model codes have pruned back several

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point is that formalities tend to funnel the substance of estate plans into standardized, efficiently interpreted lines of expression, owing to the intervention of attorneys whose participation, though not mandatory, is encouraged simply by the requirement that testators fulfill the technical formalities. See Friedman, *supra*, at 368; Langbein, *supra* note 14, at 493-94, 496-97; see also *infra* note 71. But see Sir Edward Sugden, Speech to the House of Commons (Dec. 4, 1837), in THE LAW OF WILLS BILL 16-18 (London 1838) (criticizing the practical need to consult an attorney under the British Wills Act as a "clog upon the transmission of property"); *infra* notes 51-53 and accompanying text (discussing contrary public policies).

<sup>32</sup> For an early recognition, see SUGDEN, *supra* note 14, at 236 app. Economic analysis suggests that litigation (as opposed to out-of-court settlement) is most likely to ensue when the parties have differing expectations of the probability of victory. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21.5 (4th ed. 1992); Bruce L. Hay, *Effort, Information, Settlement, Trial*, 24 J. LEGAL STUD. 29 (1995); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 63-69 (1982). But cf. Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994) (discussing additional psychological factors that can affect propensities to litigation). The more certain the evidence is, *arguendo*, the less variance there can be in expectations of the outcome of suit. Therefore, encouraging the production of better evidence *ex ante* should reduce propensities to relatively costly litigation *ex post*.

<sup>33</sup> This is known as the "dispensing power." UNIF. PROBATE CODE, *supra* note 5, § 2-503 & cmt.; see also RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 33.1 cmt. g (1992); cf. Burns v. Adamson, 854 S.W.2d 723 (Ark. 1993) (purporting to follow a rule of substantial compliance, but limiting its application); Successions of Eddy, 664 So. 2d 853 (La. Ct. App. 1995) (same). Professor Langbein had earlier advocated variations of this approach in a brace of articles. See Langbein, *supra* note 14; John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987). Professor Gaubatz had also proposed this idea. See Gaubatz, *supra* note 4, at 560-61. Many courts, in fact, were already moving in this direction, usually by evasion, rarely by frank admission. See *In re Will of Ranney*, 589 A.2d 1339 (N.J. 1991) (discussing prior case law); MCGOVERN ET AL., *supra* note 8, § 4.1, at 158; Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1038-41 (1994). For some recent examples of evasion, see Gardner v. Balboni, 588 A.2d 634 (Conn. 1991); Phillips v. Najar, 901 S.W.2d 561 (Tex. Ct. App.

of the formalities themselves, a suggestion followed in quite a few states.<sup>34</sup> Gone in many jurisdictions today is the requirement of publication by oral address; gone too, or at least going, is the old rule requiring simultaneous presence of the witnesses.<sup>35</sup> By streamlining the protocols of will execution, lawmakers reduce the danger that testators will fail by accident to abide by a procedural technicality, thereby voiding an estate plan intended to be legally performative.<sup>36</sup> But at the same time, by making it simpler to execute a will,

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1995); *In re Estate of Price*, 871 P.2d 1079 (Wash. Ct. App. 1994). The Uniform Probate Code's dispensing power thus "restores a measure of candor to the process." Mann, *supra*, at 1040. Still, one can at least raise the question whether a rule of strict compliance coupled with *tacit* evasion better serves public policy than does creation of an explicit dispensing power. The *ex ante* consequence of candor could be greater laxity in fulfilling formal requirements that do serve useful purposes. For a jurisprudential discussion, see Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191, 1197-98 (1994) ("Under appropriate conditions, a rule works best if it lies."). See also GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 172-77 (making the same point in a related context). See generally Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307 (1995). But cf. Langbein, *supra* note 14, at 524-26 (arguing that the dispensing power will not encourage lax execution of will formalities); Langbein, *supra*, at 51-52 (same). See also Miller, *supra* note 7, at 704-12. Analogous powers to excuse insubstantial errors of form exist under the laws governing other sorts of transactions. See, e.g., U.C.C. § 9-402(8) (1994).

<sup>34</sup> Within the model codes, this pruning has followed a clear progression: The Model Probate Code did away with the requirement of publication but retained the requirement that the witnesses be simultaneously present when they signed the will. MODEL PROBATE CODE, *supra* note 5, § 47. The more recent Uniform Probate Code dropped the latter requirement as well. UNIF. PROBATE CODE, *supra* note 5, app. VII, § 2-502 (pre-1990 art. 2). And the still more recent revision of Article 2 of the Code permits the witnesses to add their signatures merely within a "reasonable time" after they witness the testator's signing or acknowledgment of the will (which standard of reasonability can even validate wills signed by witnesses *after* the testator's death). *Id.* § 2-502 & cmt. (None of the model codes has required the testator to sign *at the end* of the testamentary instrument, a stipulation still found in a few jurisdictions. See *infra* note 35.)

<sup>35</sup> Discussing the trend, see MCGOVERN ET AL., *supra* note 8, § 4.1, at 158-60, and discussing the various requirements, see *id.* §§ 4.2-.3. For a catalogue of the Statute of Wills formalities prevailing in all fifty states, see RESTATEMENT (SECOND) OF PROPERTY, *supra* note 33, § 33.1 statutory note 1(a).

<sup>36</sup> The Uniform Probate Code pursues this goal quite consciously, for the Commissioners had been galvanized to take on the project by the appearance of Norman Dacey's best seller, *How to Avoid Probate!*, which had loudly condemned the cumbersomeness and expense of the system of inheritance law and probate administration then prevailing in the United States. See WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 99 (1991); J. Pennington Straus, *History and Origin of the Uniform*

lawmakers could place in greater jeopardy the evidence safeguarded by the execution process, and the aura of solemnity hanging over the proceeding could evaporate as well. When executing an estate plan becomes "just a formality," the danger that a testator will fail to distinguish performative execution from matter-of-fact communication or (more likely) a mere drafting exercise begins to loom larger.<sup>37</sup>

### B. Creation of Wills

Exactly how solemn and elaborate a ceremony need be in order to secure evidence and alert lay persons to the legal ramifications of their words is an interesting question, but it is not ours.<sup>38</sup> Our focus is consistency, so let us

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Probate Code, in ACLEA National Conference on the Uniform Probate Code: Study Materials 1, 9-11 (1972) (unpublished materials, on file with author). Dacey's specter plainly hung over the drafters when they allowed that,

If the will is to be restored to its role as the major instrument for disposition of wealth at death, its execution must be kept simple. The basic intent of these sections is to validate the will whenever possible. To this end, . . . formalities for a written and attested will are kept to a minimum.

UNIF. PROBATE CODE, *supra* note 5, app. VII, art. 2, pt. 5, general cmt., § 2-502 cmt. (pre-1990 art. 2). See also Richard V. Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L.J. 191 (1969) (Chief Reporter of the Uniform Probate Code responding to Dacey).

<sup>37</sup> By analogy, the promise under seal lost its legal power to bind promisors in many jurisdictions after the seal degenerated into a printed form, thereby attenuating its cautionary effect and leaving unclear a promisor's recognition of its legal significance. See Melvin A. Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 659-60 (1982); Paul R. Hays, *Formal Contracts and Consideration: A Legislative Program*, 41 COLUM. L. REV. 849, 850-51 (1941). For a detailed treatment of the history of the seal and its present status, see Eric M. Holmes, *Stature and Status of a Promise Under Seal as a Legal Formality*, 29 WILLAMETTE L. REV. 617 (1993). Were the promise under seal to be revived, as some commentators have proposed (e.g., Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 419-20 (1977); Steven Shavell, *An Economic Analysis of Altruism and Deferred Gifts*, 20 J. LEGAL STUD. 401, 419-20 (1991)), lawmakers would have also to restore its mystique, either by bringing back the molten wax, ribbons and signet rings of yesteryears, or by instituting some new set of alternative formalities. One scholar has proposed the use of a *thumbprint* for this purpose. See Holmes, *supra*, at 666-68.

<sup>38</sup> The issue has been much debated over the years. E.g., Lydia A. Clougherty, Note, *An Analysis of the National Advisory Committee on Uniform State Laws' Recommendation to Modify the Wills Act Formalities*, 10 PROB. L.J. 283 (1991); Langbein, *supra* note 14, at 497-98; James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV.

proceed to contrast the formalities required to execute a will with those necessary to give effect to some closely related sorts of transactions.<sup>39</sup>

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541 (1990) [hereinafter Lindgren, *Attestation Requirement*]; James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009 (1992); J.K. Maxton, *Execution of Wills: The Formalities Considered*, 1 CANTERBURY L. REV. 393 (1982); Philip Mechem, *Why Not a Modern Wills Act?*, 33 IOWA L. REV. 501, 502-08 (1948); Miller, *supra* note 7, at 289-302; Charles I. Nelson & Jeanne M. Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPP. L. REV. 331 (1979). For an early discussion, criticizing the British Wills Act of 1837, see Sugden, *supra* note 31, at 10, 15-24.

<sup>39</sup> One related sort of transaction that I will *not* address in this Article is the congeries of "will substitutes"—revocable inter vivos trusts, pay-on-death designations, revocable life insurance policies, and the like—that are functionally indistinguishable from wills, but which serve the (sometimes) useful purpose of avoiding probate administration. Will substitutes are notorious for their legal inconsistencies with wills—and with each other—respecting not only their formal requirements, but also, *inter alia*, their vulnerability to the spousal elective share, their liability to the claims of the decedent's creditors, and their subordination to the various rules of testamentary construction, such as lapse and revocation by operation of law. The tangle of disparate rules pertaining to will substitutes provides a quintessential example of structural inconsistency in law. But this one, at least, has long been recognized and has already been treated in a raft of essays that renders superfluous further elaboration here. For discussions, see Donna R. Blaustein & Paul Ward, *The Future of Revocable Intervivos Trusts: Are the Lines Between Wills and Trusts Blurring*, 9 PROB. & PROP., Sept.-Oct. 1995, at 46; Olin L. Browder, *Giving or Leaving—What Is a Will?*, 75 MICH. L. REV. 845 (1977); Gulliver & Tilson, *supra* note 14, at 23-39; Stanley M. Johanson, *Revocable Trusts and Community Property: The Substantive Problems*, 47 TEX. L. REV. 537 (1969); Jerry F. Jones, *The Effects of Divorce on Life Insurance*, 2 PROB. & PROP., Sept.-Oct. 1988, at 37; Clifton B. Kruse, Jr., *Revocable Trusts: Creditors' Rights After Settlor-Debtor's Death*, 7 PROB. & PROP., Nov.-Dec. 1993, at 40; Clifton B. Kruse, Jr., & Stanley C. Kent, *Creditors' Rights in Probate Avoidance Trusts—A Model Statute*, 9 PROB. & PROP., Jan.-Feb. 1995, at 61; Sidney Kwestel & Rena C. Sepowitz, *Testamentary Substitutes—A Time for Statutory Clarification*, 23 REAL PROP. PROB. & TR. J. 467 (1988); John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984); Robert J. Lynn, *Will Substitutes, Divorce, and Statutory Assistance for the Unthinking Donor*, 71 MARQ. L. REV. 1 (1987); William M. McGovern, Jr., *The Payable on Death Account and Other Will Substitutes*, 67 NW. U. L. REV. 7 (1972) [hereinafter McGovern, *Payable on Death Account*]; Mechem, *supra* note 38, at 518-20; John Ritchie, *What Is a Will?*, 49 VA. L. REV. 759 (1963); Richard V. Wellman, *Transfer-on-Death Securities Registration: A New Title Form*, 21 GA. L. REV. 789 (1987). Noting an inconsistency between different will substitutes, see John F. Kuether, *Significant Probate and Trust Decisions*, 29 REAL PROP. PROB. & TR. J. 263, 322-24 (1994).

The Uniform Probate Code goes a good way toward unifying the law of wills and will substitutes—this being one of its explicit objectives—but it does not quite go the distance. A fair number of discrepancies between the treatment of wills and will substitutes, and between different will substitutes, remain in the revised Articles 2 & 6. See Grayson M.P.

In fact, to discover such inconsistencies, our gaze need not stray even to cognate problems; we need seek no further than the Statute of Wills itself. In some twenty-nine jurisdictions today, the testator can make a *holographic* will—that is, a will entirely handwritten and signed—as an alternative to one that is formally executed. In some jurisdictions, holographic wills are authorized by separate, associated statutory provision; in others, they appear as an exception within the very statute mandating formal execution of wills.<sup>40</sup>

Thus, in something over half the states, the Statute of Wills has taken on a schizophrenic quality: either a will must be thoroughly formalized by virtue of witnesses and so on, or it must be thoroughly *informalized* by virtue of a statement wholly in handwriting. A will that is neither formal nor informal, but rather semi-formal—such as an estate plan typed and signed (but not witnessed) on a pre-printed will form—be it even an official statutory will form published with the state's imprimatur<sup>41</sup>—is of no legal effect whatsoever. The Uniform Probate Code endorses this structural dichotomy.<sup>42</sup>

McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 BROOK. L. REV. 1123 (1993); William M. McGovern, Jr., *Nonprobate Transfers Under the Revised Uniform Probate Code*, 55 ALB. L. REV. 1329 (1992) [hereinafter McGovern, *Nonprobate Transfers*]. Noting the aim of unification, see UNIF. PROBATE CODE, *supra* note 5, art. 2 prefatory note, § 2-503 cmt., § 2 pt. 7 general cmt.; see also RESTATEMENT (SECOND) OF PROPERTY, *supra* note 33, § 33.1 cmt. g, § 34.2 & cmt. g, § 34.6 & cmt. b; RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS § 10.1 & cmt. e (Tentative Draft No. 1, Mar. 28, 1995). Several critics of the Code have been so bold as to propose thoroughgoing union, though in different ways. Cf. McGovern, *Nonprobate Transfers*, *supra*, at 1350-53; Miller, *supra* note 7, at 717-21.

<sup>40</sup> The states are tallied in RESTATEMENT (SECOND) OF PROPERTY, *supra* note 33, § 33.1 statutory note 1(f). For a doctrinal survey, see Kevin R. Natale, Note, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 HOFSTRA L. REV. 159 (1988).

<sup>41</sup> On statutory wills, see Gerry W. Beyer, *Statutory Fill-in Will Forms—The First Decade: Theoretical Constructs and Empirical Findings*, 72 OR. L. REV. 769 (1993).

<sup>42</sup> UNIF. PROBATE CODE, *supra* note 5, § 2-502(b); *id.* app. VII, § 2-503 (pre-1990 art. 2). See also MODEL PROBATE CODE, *supra* note 5, § 48. (It is possible, however, that an unexecuted typed will would be held valid under the Uniform Probate Code's dispensing power. See *supra* note 33 and accompanying text.) Several early drafts of the Uniform Probate Code made the provision validating holographs optional. See UNIF. PROBATE CODE § 237A (First Reporter's Draft, Aug. 1966); *id.* at § 2-502A & cmt. (Third Working Draft, Nov. 1967); *id.* at § 2-502A & cmt. (Summer Draft, July 14, 1967). The Fourth Working Draft eliminated holographic wills completely "in the interests of uniformity and simplicity . . . hav[ing] occasioned frequent litigation in those states which permit such wills," but they were reinstated in the following draft. See *id.* at § 2-502 cmt. (Fourth Working Draft, Second Tentative Draft, July 22-Aug. 1, 1968); *id.* at § 2-503 (Fifth Working Draft, n.d., c. 1969). The structural inconsistency between execution requirements and holographic wills has not gone unnoticed. See Langbein, *supra* note 14, at 498;

How came to pass this state of affairs? The holographic will is a legal implant, a native not of common, but of civil law.<sup>43</sup> It was first received into the statute book of colonial Virginia as early as 1748, despite its repugnance to the British Statute of Frauds,<sup>44</sup> and (propelled by Virginia's influence?) spread further among southern states in the late eighteenth and early nineteenth

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Lindgren, *Attestation Requirement*, *supra* note 38, at 558-60; Bruce H. Mann, *Self-Proving Affidavits and Formalism in Wills Adjudication*, 63 WASH. U. L.Q. 39, 49-50 (1985); Mann, *supra* note 33, at 1042. But cf. Sugden, *supra* note 31, at 19 (suggesting that the inconsistency is justified by public policy); Miller, *supra* note 7, at 629-31 (same).

<sup>43</sup> Executed wills of the common law sort are unknown under civil law, though the civil code does offer ritualistic alternatives to the holograph. See CODE NAPOLEON; THE FRENCH CIVIL CODE §§ 967-80 (Claitor's Book Store, photo. reprint 1960) (1804). The historical origins of the holographic will in the United States have not been explored by scholars. On its European roots, see Reginald Parker, *History of the Holograph Testament in the Civil Law*, 3 JURIST 1 (1943). In Great Britain, holographic wills sufficed to pass both realty and personalty until the Statute of Frauds of 1677 and thereafter to pass personalty until the Wills Act of 1837. On holographs in English legal history, see R.H. Helmholz, *The Origin of Holographic Wills in English Law*, 15 J. LEGAL HIST. 97 (1994).

<sup>44</sup> An Act Directing the Manner of Granting Probat[e] of Wills, and Administration of Intestates Estates (1748), in 5 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 454, 456 § 7 (William W. Hening ed. 1819) ("[A]ll devises and bequests of any lands, or tenements . . . shall be attested . . . by two or more credible witnesses, or shall be wholly writ by the said devisor[']s own hand, or else they shall be void and of no effect.") Cf. An Act for Prevention of Frauds and Perjuries, 29 Car. 2, c. 3, § 5 (1677) (Eng.) ("[A]ll Devises and Bequests of any Lands or Tenements . . . shall be attested . . . by three or fower credible Witnesses or else they shall be utterly void and of none effect."). The Privy Council ratified the Virginia statute despite its repugnance, even as the Council disallowed a companion statute on intestacy. Proclamation Repealing Certain Acts of Assembly Passed at the Revisal of 1748, in 5 THE STATUTES AT LARGE, *supra*, at 567-68. (No comparable exception appeared in the Statute of Frauds in colonial Massachusetts, dating to 1692. See An Act for Prevention of Frauds and Perjuries, in MASSACHUSETTS PROVINCIAL LAWS, 1692-1699, at 23 (John D. Cushing ed. 1978).) Professor Bird erroneously traces the first appearance of the holographic will in America to a Louisiana statute of 1808 modeled after the Napoleonic Code of 1804. See Gail B. Bird, *Sleight of Handwriting: The Holographic Will in California*, 32 HASTINGS L.J. 605, 606-07 (1981). Long predating the Napoleonic Code, the Virginia statute may have drawn its inspiration from civil customary law, for Great Britain prior to the Statute of Frauds had never excused a witnessing requirement in the case of holographs; it had simply imposed no witnessing requirement whatever. See The Act of Wills, Wards, and Primer Seisins, 32 Hen. 8, c. 1, § 1 (1540) (Eng.). But the legislative history of the Virginia statute (which formed part of a general revision of the colony's laws in 1748-49) has never been investigated. Generally on the legislative revision, see Gwenda Morgan, *"The Privilege of Making Laws": The Board of Trade, The Virginia Assembly and Legislative Review, 1748-54*, 10 J. AM. STUD. 1 (1976).



centuries,<sup>45</sup> a time of broad American interest in civil codes.<sup>46</sup> Rather than supplanting common law execution, the holographic will took root beside it, and the two alternative forms have subsisted ever since, appearing side by side in the Uniform Probate Code.

Plainly, the holographic will cannot be justified within the framework of traditional will execution theory. Though the handwriting requirement serves to warrant the authenticity of the document (marginally) more conclusively than would a signature alone, and hence helps (slightly) to substitute in that regard for the testimony of witnesses,<sup>47</sup> a handwritten testamentary instrument contains no aspects of ceremony.<sup>48</sup> Inevitably, courts must contend with nettlesome questions concerning the intent of authors to render legally effective holographic documents that are offered for probate as wills.<sup>49</sup> (Those nettles are most prickly when a holograph mixes testamentary declarations with

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<sup>45</sup> See Wills and Testaments, ch. 157, § 4, REVISED STATUTES OF THE STATE OF ARKANSAS ADOPTED AT THE OCTOBER SESSION OF THE GENERAL ASSEMBLY OF SAID STATE, A.D. 1837, at 765 (William McK. Ball & Samuel C. Roane eds., 1838); An Act to Reduce into One, the Several Acts Concerning Wills, § 1, ACTS PASSED AT THE FIRST SESSION OF THE FIFTH GENERAL ASSEMBLY FOR THE COMMONWEALTH OF KENTUCKY 162 (1797); An Act to Explain, Amend and Supply the Deficiencies of an Act Passed Last Assembly at Hillsborough, ch. 10, § 5, ACTS OF ASSEMBLY OF THE STATE OF NORTH CAROLINA 22, 23 (1784); TENN. CONST. OF 1796, art. X, § 2 (receiving into Tennessee all laws previously in force in the state as a territory of North Carolina); CODE OF TENNESSEE ENACTED BY THE GENERAL ASSEMBLY OF 1857-58, § 2163 (1858).

<sup>46</sup> See Peter Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403 (1966). See generally ALAN WATSON, *LEGAL TRANSPLANTS* (1993). By contrast, the commission that drafted Britain's act of Parliament setting will formalities in 1837 considered but rejected giving effect to holographic wills as an exception to the witnessing requirement. See SUGDEN, *supra* note 14, at 181 app.; Sugden, *supra* note 31, at 19 (regretting the decision); An Act for the Amendment of the Laws with respect to Wills, 7 Will. 4 & 1 Vict. c. 26, § 9 (1837) (Eng.).

<sup>47</sup> Commentators have disagreed over whether the handwriting requirement suffices, from an evidentiary standpoint, to make up for the lack of witnesses. Compare Bird, *supra* note 44, at 610, 632 with Estate of Black, 641 P.2d 754, 756 (Cal. 1982) and Gunn v. Phillips, 410 S.W.2d 202, 206 (Tex. App. 1966). For an early discussion, see 2 BLACKSTONE, *supra* note 26, at \*501-02.

<sup>48</sup> Nor do the requirements of a holographic will suffice to protect the testator from duress or to channel wills into easily proven or interpreted lines. "The exemption of holographic wills from the usual statutory requirements seems almost exclusively justifiable in terms of the evidentiary function." Gulliver & Tilson, *supra* note 14, at 13; see *id.* at 13-14.

<sup>49</sup> E.g., Bailey v. Kerns, 431 S.E.2d 312 (Va. 1993) (holographic document offered for probate held intended to be legally effective); Jessup v. Jessup, 267 S.E.2d 115 (Va. 1980) (holographic document offered for probate held not intended to be legally effective).

ordinary communication, as when the alleged will appears within a diary or a letter to the alleged beneficiary.<sup>50</sup>) Holographic wills are best understood as abandoning the ritual function of the Statute of Wills in order to accomplish another purpose: namely, ensuring that a person's modest financial means do not abridge her legal means of carrying out her estate plan.<sup>51</sup> By providing

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<sup>50</sup> "People are prone to write things in letters they never dreamed would be regarded as a will . . . . Such statements are often made casually or to record a passing thought or a purpose to be accomplished later on." *Bogges v. McGaughey*, 207 S.W.2d 766, 767 (Ky. 1948). For an (in)famous example, see *In re Kimmel's Estate*, 123 A. 405 (Pa. 1924). For some recent cases (which divide over the admissibility of extrinsic evidence to clarify whether a writing submitted as a holograph evinces testamentary intent, *cf. supra* note 27), see *Mallory v. Mallory*, 862 S.W.2d 879 (Ky. 1993) (barring extrinsic evidence); *Wolfe v. Wolfe*, 448 S.E.2d 408 (Va. 1994) (same); *In re Estate of Ramirez*, 869 P.2d 263 (Mont. 1994) (admitting extrinsic evidence); *Ayala v. Martinez*, 883 S.W.2d 270 (Tex. Ct. App. 1994) (same); *see also* UNIF. PROBATE CODE, *supra* note 5, § 2-502(c) (same). For discussions of the case-law of holographs where testamentary intent is unclear, see *ATKINSON*, *supra* note 30, § 47; *McGOVERN ET AL.*, *supra* note 8, § 4.5, at 175-76; 1 *PAGE*, *supra* note 11, § 6.21.

<sup>51</sup> *See In re Estate of Erickson*, 806 P.2d 1186, 1188 (Utah 1991); *In re Estate of Teubert*, 298 S.E.2d 456, 460 (W. Va. 1982). Likewise, the Commissioners:

[t]he decision [to provide for holographic wills] is consistent with the determination . . . to relax purely formal restrictions regarding wills to the end that persons may have an increased opportunity to execute valid wills without professional assistance. . . . [F]or persons of modest means . . . and for persons who are unable to secure professional assistance, the holographic will may be valuable.

UNIF. PROBATE CODE § 2-503 cmt. (Fifth Working Draft, n.d., c. 1969) (abbreviated in UNIF. PROBATE CODE, *supra* note 5, app. VII, art. 2, pt. 5, general cmt., § 2-503 cmt. (pre-1990 art. 2)). Professor Wellman, Chief Reporter of the original Uniform Probate Code, elaborates:

[T]he public plainly insists on being permitted to use a 'do-it-yourself' approach to will making, as is permitted in virtually every other enterprise . . . . If holographic wills prove to be a source of trouble and litigation, it will become obvious to the consuming public that lawyers have valuable training and experience to offer prospective testators.

Richard V. Wellman, *Arkansas and the Uniform Probate Code: Some Issues and Answers*, 2 U. ARK. LITTLE ROCK L.J. 1, 15 (1979); *see also* Sugden, *supra* note 31, at 16-19 (offering an early, similar policy analysis); Mary L. Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 614-15 (1988) (noting that the general trend toward reducing the statutory requirements for will execution promotes equal estate planning under law, without discussing holographs); *supra* note 36. *But see* Bird, *supra* note 44, at 631-33 (suggesting pointedly that because holographs result in such poor estate planning and so much costly

citizens a simple and straightforward vehicle for estate planning without the assistance of professional counsel,<sup>52</sup> holographic wills make dying testate far easier and hence promote the principle of "equal estate planning under law"—a principle which, even if imperceptible within the emanations of the penumbra of the Fourteenth Amendment, can nonetheless be judged a goal worth striving for.<sup>53</sup> In pursuit of that goal, jurisdictions that give effect to holographic wills are prepared to conduct problematic inquiries into, and endure costly litigation over,<sup>54</sup> the performative intent of the testator, when they can at least rest assured that the document submitted for probate is genuine.

Such an approach has its virtues, to be sure. It resolves the tension between the need to confirm performative intent and the desire to make testation easier by plumping emphatically for ease. Whether that approach better serves public policy is another matter—one that has been debated off and on for centuries.<sup>55</sup> Yet, by warranting holographic wills and witnessed wills *in the alternative*, holographic will jurisdictions have not settled the issue so much as they have encapsulated it. It appears almost as if lawmakers are of two minds on the question, each promulgating its own, contradictory approach to the problem at hand.

A decision systematically to resolve the tension calls for a *singular* rule of will execution. If that resolution favors discarding testamentary formality for the sake of facility, then the singular rule should be one giving effect to any signed will, whether handwritten or typed. The current ban on typewritten or printed substantive provisions in an unwitnessed holograph is perverse from the standpoint of the ritual function: it would seem that typing or printing indicates, if anything, greater finality than does handwriting. If unwitnessed handwritten documents are to be given effect in order to achieve equal estate planning under

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post-mortem litigation, the statutes authorizing them in truth constitute "a species of consumer fraud."). A secondary, related purpose of holographs may be to enable testators who fall ill suddenly to execute an estate plan before death overtakes them. *But see supra* note 28 (discussing the countervailing policy against "deathbed wills").

<sup>52</sup> Some testators have executed holographs expressly in order to avoid involving an attorney in their affairs. *See* Harry Hibschan, *Whimsies of Will-Makers*, 66 U.S. L. Rev. 362, 365–66 (1932); *See also* *Gilman v. McArdle*, 2 N.E. 464, 464 (N.Y. 1885) (expressing a similar sentiment for avoiding probate). On the other hand, counselors can sometimes be found making holographic wills for themselves. For one prepared by a practicing attorney and inscribed onto a greeting card, see *Trim v. Daniels*, 862 S.W.2d 8 (Tex. Ct. App. 1992).

<sup>53</sup> The general principle is framed and defended in *Fellows*, *supra* note 51, at 613.

<sup>54</sup> The authors of the Fourth Working Draft of the Uniform Probate Code proposed to disallow holographic wills so that courts could avoid the clutter of this litigation. *See supra* note 42.

<sup>55</sup> *See supra* notes 31, 38.

law, then *a fortiori* typed or typed and printed unwitnessed documents should be as well, so long as they are signed and hence can be authenticated.<sup>56</sup>

Alternatively, lawmakers could craft a singular rule that attempts to resolve the policy tension by way of compromise. Lawmakers could, for example, jettison the witnessing requirement, but mandate that every will (including wholly handwritten ones) contain some other tangible expression of formality, such as a testamentary *heading* on the document.<sup>57</sup> Such an approach would render will execution simpler, but still require a modicum of intrinsic evidence showing that the document was intended to be legally performative. Or, as a more general safeguard, lawmakers might comprehensively abandon the witnessing requirement but mandate that the proponents of a will prove performative intent by clear and convincing evidence<sup>58</sup>—the same standard that currently applies (by comparison) to proof of lost wills in most

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<sup>56</sup> See CAL. PROB. CODE § 6111(c) (West 1991) (allowing holographic wills to set forth a printed statement of testamentary intent when they are superimposed onto a printed will form). See Langbein, *supra* note 14, at 520 (advocating giving effect to typed and/or printed documents); Lindgren, *Attestation Requirement*, *supra* note 38, at 559–60 (same); Mann, *supra* note 33, at 1044 (criticizing the Uniform Probate Code's requirement that printed matter form no "material portions" of holographic wills). But see *In re Pulvermacher's Will*, 116 N.Y.S.2d 110, 112 (App. Div. 1952) ("Where a will or codicil is entirely in the handwriting of a testator, there is little room for doubt that he understood the testamentary character of the instrument."), *rev'd on other grounds*, 305 N.Y. 378 (1953), *modified*, 305 N.Y. 923 (1953); Miller, *supra* note 7, at 627–33 (criticizing Langbein's analysis).

<sup>57</sup> Present law does not require holographs to be captioned as "wills." See MCGOVERN ET AL., § 4.5 at 175. Cf. N.C. GEN. STAT. § 31-3.4(a) (1995) (requiring that a holographic instrument be found among the decedent's "valuable papers" or deposited with someone for "safekeeping" in order to be legally effective (a provision in force since 1784!)); see also An Act to Explain, Amend and Supply the Deficiencies of an Act Passed Last Assembly at Hillsborough, ch. 10, § 5, ACTS OF ASSEMBLY OF THE STATE OF NORTH CAROLINA 22, 23 (1784); TENN. CODE ANN. § 32-1-110 (1984 & Supp. 1995) (same, but only pertaining to holographs disposing of realty and written before February, 1941). In some civil law jurisdictions, a letter cannot be probated as a holograph, *i.e.*, the holograph must be self-contained in order to manifest performative intent. Professor Atkinson opined that "[t]here is considerable justification for such provisions." ATKINSON, *supra* note 30, § 47, at 210.

<sup>58</sup> Assuming that the authors of holographs are aware of it, a clear and convincing evidence standard should serve *ex ante* to discourage unusually informal holographic wills and hence to provide courts with better proof of testamentary intent. Alternatively, such a standard of proof, like a formalities requirement, would prefer the intestacy scheme to uncertain expressions of testamentary intent. See *supra* note 30; see generally Michael L. Davis, *The Value of Truth and the Optimal Standard of Proof in Legal Disputes*, 10 J.L. ECON. & ORG. 343 (1994); John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1072 (1968).

jurisdictions<sup>59</sup>—where an act of witnessing would suffice to meet this evidentiary standard. Under present law, by contrast, holographs need contain no hint of formality, and in most states they can be proven by a mere preponderance of the evidence.<sup>60</sup>

That no comprehensive resolution of the policy tension has been ventured under state law—or under the Uniform Probate Code—is in itself suggestive. Surely, lawmakers are not unaware of the tension and of the oddity of pairing executed wills with holographic ones. Nonetheless, they have found this solution easier to adopt. The threads of precedent that holographs bring to a probate code, albeit threads alien to the common law, seemingly have made them more alluring to legislators (and to Commissioners) than a better-tailored

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<sup>59</sup> See 3 PAGE, *supra* note 11, § 29.156. As when dealing with a holograph, courts presented with a formalized-but-lost will face greater uncertainty than when probating a formalized will that does survive. The analogy is not precise, however, in that a holograph provides sound evidence of the substance of an estate plan while lacking a clear manifestation of intent to be legally performative; *e contra*, a lost will provides clear evidence of performative intent (having been formalized) but instead wants iron-clad evidence as to its substance. See also UNIF. PROBATE CODE, *supra* note 5, § 2-503, which requires clear and convincing evidence to prove a defectively formalized will under the Code's dispensing power, discussed *supra* note 33 and accompanying text. Here the analogy appears more precise: if an improperly formalized will can be proved only by clear and convincing evidence (if at all), why should a lesser standard of proof be applied to unformalized holographs? Yet under the Code (without explanation), holographic wills need only be proved by a preponderance of the evidence. Compare UNIF. PROBATE CODE, *supra* note 5, § 2-502(b) & (c) & cmt. with *id.* § 2-503 & cmt. (drawing no comparison between the two sections).

<sup>60</sup> See 3 PAGE, *supra* note 11, at § 29.167. In a few jurisdictions, however, more stringent standards of proof do apply to holographs. In Tennessee, for many years, holographic wills disposing of realty had to be proved by at least three "credible" witnesses to the authenticity of the handwriting. For holographs written after February, 1941, the authenticity of the handwriting must be proved by two witnesses. See TENN. CODE ANN. §§ 32-1-105, 32-1-110 (1984 & Supp. 1995). In Arkansas for many years, all holographic wills had to be proved by the "unimpeachable" evidence of at least three disinterested witnesses to the authenticity of the handwriting. See Wills and Testaments, ch. 157, § 4, REVISED STATUTES OF THE STATE OF ARKANSAS ADOPTED AT THE OCTOBER SESSION OF THE GENERAL ASSEMBLY OF SAID STATE, A.D. 1837, at 765 (William McK. Ball & Samuel C. Roane eds., 1838). Current law still requires three "credible" witnesses proving the handwriting "and such other facts and circumstances as would be sufficient to prove a controverted issue in equity." ARK. CODE ANN. § 28-40-117(b) (Michie 1987 & Supp. 1993). In North Carolina, three witnesses to the handwriting have always been, and still are, required. See An Act to Explain, Amend and Supply the Deficiencies of an Act Passed Last Assembly at Hillsborough, ch. 10, § 5, ACTS OF ASSEMBLY OF THE STATE OF NORTH CAROLINA 22, 23 (1784); N.C. GEN. STAT. § 31-18.2 (1995).

alternative woven from whole cloth. Historical provenance can be a potent force—even sustaining the coexistence of clashing doctrines that might have been reconciled.

### C. *Contracts and Wills*

Moving beyond the Statute of Wills, let us inspect with a structurally-comparative eye the formalities associated with another category of law—namely, the law of contract. In order to become binding on its parties, a commercial transaction need not comply with the same formalities that surround gratuitous transactions. It need only comply with the modern Statute of Frauds, which requires a writing (but no signature or witnesses) in some cases but also warrants as effective a parol agreement in many other cases. Thus, the high-formality associated with the will execution ceremony is by and large absent from contract law.<sup>61</sup>

Again, there may well be good reasons for making this distinction. Lon Fuller suggested that contracts, involving as they do exchanges, manifest a “natural formality” that is wanting in the field of gratuitous transfers. In other words, the very fact that they are *doing* business will serve to remind the parties that when they speak, they had better *mean* business.<sup>62</sup> To distinguish sharply in this respect a contract from a gratuitous transfer is problematic, however. Since classical times, theorists have recognized that gifts *also* involve implicit exchanges, generally in the form of social services, generating what political economists nowadays call “social capital.”<sup>63</sup> Persons often, if not

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<sup>61</sup> See U.C.C. § 2-201 (1991); RESTATEMENT (SECOND) OF CONTRACTS § 110 & ch. 5 Statutory Note (1981). The current draft revision of Article 2 of the Uniform Commercial Code would further enhance the dichotomy, in light of its proposal to repeal the Statute of Frauds in its entirety. See U.C.C. § 2-201 & reporter's note (Discussion Draft of revised Article 2: Sales, July 29 - Aug. 5, 1994); Permanent Editorial Board for the Uniform Commercial Code, Uniform Commercial Code Article 2: Preliminary Report 50-58 (1990) (unpublished manuscript, on file with author).

<sup>62</sup> See Fuller, *supra* note 28, at 814-17 (allowing, however, that the natural formality involved in the making of an *executory* contract is relatively less than in the subsequent acceptance of performance by one of the parties to the contract).

<sup>63</sup> The earliest discussion of which I am aware appears in THE NICOMACHEAN ETHICS OF ARISTOTLE, bk. 8, chs. 15-16, at 276-80 (J.E.C. Welldon ed., 1912) (ms. c. 334-23 B.C.). For the most recent discussion, see ODED STARK, ALTRUISM AND BEYOND (1995). For further references, see Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 9-10 (1992); Adam J. Hirsch, *Inheritance and Bankruptcy: The Meaning of the “Fresh Start,”* 45 HASTINGS L.J. 175, 211-14 (1994) [hereinafter Hirsch, *Inheritance and Bankruptcy*]; Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 21 n.70 (1995) [hereinafter

always, give in anticipation and expectation of reciprocal benefits.<sup>64</sup> Apart from their knowledge of the different ramifications of contractual and donative utterances *as a matter of positive law*, persons will not clearly choose their words with any greater circumspection in the one case than in the other.<sup>65</sup> But to expand on Fuller a bit, perhaps the point is that in our society the elaborate process of bargaining and dickering that usually precedes a contractual agreement in itself comprises a ritual that will serve further to distinguish that

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Hirsch, *Spendthrift Trusts*]; Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 630 (1989) [hereinafter Hirsch, *Insolvent Heir*]. On the concept of social capital, see PETER M. BLAU, *EXCHANGE AND POWER IN SOCIAL LIFE* (1964); JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* 300–21 (1990) (coining the phrase); George C. Homans, *Social Behavior as Exchange*, 63 AM. J. SOC. 597 (1958). Some courts have acknowledged the culture of reciprocity within which gifts are conferred, at least in the presence of an informal understanding concerning the social services “owed in exchange” for them. When the social services have not been forthcoming, courts have granted donors restitution. See MCGOVERN ET AL., *supra* note 8, § 5.5, at 224. *Vise versa*, in some cases the provision of social services has been deemed adequate consideration to render binding a gift promise. See *In re Estate of Bucci*, 488 P.2d 216 (Colo. Ct. App. 1971); Harold C. Havighurst, *Services in the Home—A Study of Contract Concepts in Domestic Relations*, 41 YALE L.J. 386 (1932); cf. RESTATEMENT OF RESTITUTION § 57 & cmt. d (1937) (limiting the principle to cases where an agreement was intended but was expressed in terms of reciprocal gifts). Some scholars nonetheless continue sharply to distinguish contracts from gifts. *E.g.*, Eisenberg, *supra* note 37, at 643, 656; James D. Gordon III, *Consideration and the Commercial-Gift Dichotomy*, 44 VAND. L. REV. 283 (1991).

<sup>64</sup> Of course, to view gratuitous transfers singularly as contract-substitutes would be an absurd oversimplification; rather, they are the financial vehicles of a more complex gray economy, part of which is driven by gratuitous transferors’ interdependent utilities with their transferees, and part of which also functions to cement and maintain social relations. But gratuitous transfers are no less significant economically to transferors on that account. For discussions of these other aspects of the socioeconomics of gifts, see GARY S. BECKER, *A TREATISE ON THE FAMILY* 277–306 (rev. ed. 1991); DAVID CHEAL, *THE GIFT ECONOMY* (1988); Posner, *supra* note 37, at 411–14.

<sup>65</sup> Compare the related discussion in Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39, 53–54 (1992). An associated argument offered by Fuller and others is that gratuitous transfers hold less economic importance than contracts and hence do not merit enforcement unless formalized in a manner that courts can verify at comparatively lower legal process cost. Modern scholars have roundly condemned this view; Professor Kull suggests that it “reflect[s] little more than mercantilist prejudice.” *Id.* at 49. Compare Fuller, *supra* note 28, at 815, and Eisenberg, *supra* note 28, at 3–5, with Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155, 179–203 (1989), and Mary L. Fellows, *Donative Promises Redux*, in *PROPERTY LAW AND LEGAL EDUCATION* 27, 28–29 (Peter Hay & Michael H. Hoeflich eds., 1988), and Kull, *supra*, at 46–59; see also Posner, *supra* note 37, at 411–17 (asserting that gratuitous transfers are intrinsically as important as exchanges but are justifiably treated differently for other reasons).

event from ordinary discourse.<sup>66</sup> The more diffuse, implicit agreements signaled by gratuitous transfers are not sealed in such a ritual by the traditions of our culture<sup>67</sup> and hence require an alternative one.<sup>68</sup>

Furthermore, the commercial parties who typically enter into contracts are possessed of more legal savvy than the lay testator. They are likely to have greater professional knowledge of when their words would be construed to have performative effect. And from an evidentiary standpoint, parties to a contract in general remain able to testify *in personam*. The transaction is usually short-term; memories will be fresh. By contrast, testamentary instruments are often executed long before death; memories may be dim, and the chief witness will be eternally indisposed. Plainly, the benefits of transcription are relatively greater in the case of wills than of contracts. And beyond this lies the simple fact that commercial actors are busy persons; to require them to execute a ritual whenever they make a deal would constitute a significant burden, consuming time among those for whom it is of the essence. Among lay persons who hold time less dear, and who make or update their wills only rarely in any event, a legal requirement of ritual execution appears far less of an imposition.<sup>69</sup>

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<sup>66</sup> On the ritual element of the bargaining process, see BROMLEY KNIVETON, *THE PSYCHOLOGY OF BARGAINING* 47-57 (1989).

<sup>67</sup> Though sometimes they are! Birthdays and certain holidays, in particular, are ceremonial occasions within which gift-giving occupies a prominent place. *Arguendo*, on such occasions at least, gratuitous transfers could be permitted by mere words without risking confusion over whether the donor intended those words to be performative. On the other hand, there is no equivalent ceremonial occasion on which *testamentary* transfers are traditionally made. These would obviously be out of place on birthdays or holidays and hence would not fit naturally into the gift-giving ceremonies that accompany them.

<sup>68</sup> In this context, the possibility of allowing a benefactor to substitute an utterance for a ritual by framing an *inter vivos* gift (if not a testamentary transfer) as an exchange for *nominal* consideration presents an interesting, marginal case. On the one hand, the form of words here chosen differs from that used in the typical gratuitous transfer and hence helps to distinguish the declaration from ordinary discourse. Justifying the doctrine of nominal consideration on this basis, see Eisenberg, *supra* note 37, at 660-62; Fuller, *supra* note 28, at 820; C.J. Hamson, *The Reform of Consideration*, 54 L.Q. REV. 233, 242-43 (1938); *cf. supra* notes 16-24 and accompanying text. On the other hand, in the context of a gratuitous transfer, no ritual of dickering will typically have accompanied the words. Perhaps with this thought in mind, the Restaters declined to endorse the enforcement of gratuitous promises clothed with "a mere pretense of bargain." RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 61, § 71 cmt. b, illus. 5, § 87 cmt. b & c; see also 2 AUSTIN, *supra* note 28, at 907 (suggesting that nominal consideration is inadequate because deliberateness cannot be inferred, absent the contemplation of advantage as a result of an exchange).

<sup>69</sup> On the other hand, in one respect there is a relatively *greater* need for formalities in the area of contracts than in the area of testamentary transfers. To the extent that parties



All told, lawmakers may well have been right to uncouple the Statute of Wills from the Statute of Frauds. But we are not quite done with our inspection, for a number of hybrid entities, falling in between the contract and the testamentary transfer, remain to be scrutinized. Consider the contract to *make* a will.<sup>70</sup> This compound is everywhere enforceable in equity, and the question arises how it is to be categorized, and hence formalized. *Arguendo*, the policies underlying the formalization of contracts to make wills more closely resemble those applicable to a testamentary transfer, in that they generally subsist outside a business environment, are entered into by lay persons, and become payable or otherwise enforceable at one party's death, often long after they were formulated.<sup>71</sup> In the vast majority of jurisdictions, however, contracts to make wills fall into the contract category<sup>72</sup> and hence can be created by parol agreement (though many states now require at least an

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may act without due deliberation, rituals give them useful time to think things over, thereby reducing the risk that they will regret their transactional decisions upon reflection. For this purpose, formalities can play a more important role in the area of contracts than in that of wills, for whereas contracts are binding, wills are not; the testator ordinarily will have plenty of time to deliberate over, and possibly to alter, her will after it is executed. See the related discussion *supra* note 28; cf. Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 786-97 (1983) (addressing cooling-off periods as a means of ensuring due deliberation by contracting parties).

<sup>70</sup> The most thorough (but dated) treatment is BERTEL M. SPARKS, *CONTRACTS TO MAKE WILLS* (1956). For recent discussions, see Daniel S. Field, Note, *Will Contracts for Personal Services and Real Property During the Lifetime of the Aging Devisor: Resolving the Continuing Dilemma*, 11 PROB. L.J. 57 (1992); Clifton B. Kruse, Jr., *Contracts to Devise or Gift Property in Exchange for Lifetime Home Care—Latent and Insidious Abuse of Older Persons*, 12 PROB. L.J. 1 (1994).

<sup>71</sup> Cf. Professor Fratcher:

Contracts affecting succession are rarely desirable as estate planning devices and they are likely to cause much suffering if entered into without competent advice as to their effects. Consequently, it seems desirable to impose [formal] requirements upon the making of such contracts that are so difficult that they cannot be met without the advice of counsel.

William F. Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. REV. 1037, 1081 (1966) (commenting on the First Reporter's Draft of the Uniform Probate Code, discussed *infra* note 76). Indeed, it is true that contracts to make wills have been notorious litigation breeders.

<sup>72</sup> Florida and Texas are the exceptions, requiring that contracts to make wills be formalized with a witnessed writing, as under the Statute of Wills. See FLA. STAT. ANN. § 732.701 (West 1995); TEX. PROB. CODE ANN. § 59A (West 1980). A working draft of the Uniform Probate Code had also included such a provision. See *infra* note 76.

unwitnessed writing).<sup>73</sup>

Well, so be it, but consider then another hybrid category: the conditional bequest. *This* entity comes under the category of wills and must be executed accordingly.<sup>74</sup> The two hybrids are close relatives, yet their kinship has been nowhere remarked and the legal formalities that pertain to them have remained distinct. Consider the alternative scenarios:

*Scenario # 1:* Testator writes out an *unexecuted* document promising A \$10,000 under the testator's will if A stops smoking before the testator's death. Assuming A stops smoking, this document is enforceable in equity against the testator's estate as a contract to make a will (no matter what the executed will ultimately provides).

*Scenario # 2:* Testator writes out a will bequeathing \$10,000 to A if A has stopped smoking by the time of the testator's death. It turns out that the will was mis-executed under the state Statute of Wills. This document, though in writing, is *unenforceable* as a conditional bequest (even if A stopped smoking, as required).<sup>75</sup>

Note well that these two fact-patterns, though similar, are not identical. A conditional bequest remains revocable, even if the beneficiary fulfills the condition. But they are functionally pretty close and one may be hard pressed to justify distinguishing them formalistically. Indeed, to the extent that they *do* differ, the distinction in formalities only reinforces one's sense of the law's arbitrariness, for it is the binding contract that requires *less* formality than the nonbinding conditional bequest.

Without comment, the Uniform Probate Code codifies this traditional formalistic dichotomy.<sup>76</sup>

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<sup>73</sup> In some twenty jurisdictions today, contracts to make wills can be formalized by mere parol agreement, without any reference to the contract in a will or other writing. For a recent example of a contract to make a will proved by parol evidence, see *Black v. Edwards*, 445 S.E.2d 107 (Va. 1994). Even in those jurisdictions where a writing is required, but where the parties merely reached a parol agreement, performance by one party may still suffice to render the contract to make a will binding. See MCGOVERN ET AL., *supra* note 8, § 9.5, at 386-88.

<sup>74</sup> On conditional bequests, see ATKINSON, *supra* note 30, § 82; 5 PAGE, *supra* note 11, §§ 44.1-33.

<sup>75</sup> It is not inconceivable that, faced with this second set of facts, a court would reach to find the conditional bequest a contract to make a will and (once again) enforce it in equity—particularly if the testator had *shown* the will to the conditional beneficiary. A search has revealed no cases on point. But the theory here is clear enough: performance of a condition does nothing more than render a conditional bequest an absolute bequest. See 5 PAGE, *supra* note 11, § 44.11, at 418.

<sup>76</sup> Under the Uniform Probate Code, a contract to make a will can be formalized by an unwitnessed, signed writing; an oral statement can also prove the terms of a contract to

## D. Revision of Wills

As just noted, wills, by their nature, are ambulatory. One can revise a will *at will*, and the interests it creates are mere expectancies, in no wise encumbering the properties it bequeaths. When a testator decides to alter an existing will, what formalities must she follow? In order initially to give effect to an estate plan, the testator must execute (or, in jurisdictions permitting holographs, hand-write) the testamentary instrument, for reasons we have already explored. Those reasons are equally apropos to amendments of estate plans, which also need to be recognized by the testator as legally performative and carried out under verifiable circumstances. The law acknowledges this symmetry. Subsequent wills and codicils must be executed with precisely the same formalities as the original testamentary instruments they supersede. Subsequent *unexecuted* documents cannot revise prior wills, even if the prior will refers to them.<sup>77</sup>

### 1. Acts and Formality

Sometimes, however, an estate plan will depend not on subsequent words, but rather on subsequent *acts*. For instance, a testator might bequeath to her beneficiary "whatever automobile I own at my death." If effective, the corpus of such a bequest becomes contingent upon the subsequent decisions of the

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make a will if the executed will refers to the contract, whereas references in wills to oral statements would be inadmissible to prove additional terms of the will itself—including conditions attached to bequests—under the doctrine of incorporation by reference, which permits references in wills only to extrinsic *writings*. See UNIF. PROBATE CODE, *supra* note 5, § 2-514; *id.* app. VII, § 2-701 (pre-1990 art. 2). For the provision on incorporation by reference, see *id.* § 2-510; *id.* app. VII, § 2-510 (pre-1990 art. 2). Neither the old nor the new comment draws any contrast to the treatment of conditional bequests or to incorporation by reference. Intriguingly, a working draft of the Uniform Probate Code would have required parties to formalize all contracts to make wills "in the manner hereinafter prescribed for the execution of attested written wills," thereby achieving structural consistency and (arguably) better policy. See *supra* note 71 and accompanying text; UNIF. PROBATE CODE § 234 (First Reporter's Draft, Aug. 1966). No subsequent comments indicate why the provision was dropped. The provision ultimately adopted is nonetheless described as intended "to tighten the methods by which contracts concerning succession may be proved." UNIF. PROBATE CODE, *supra* note 5, app. VII, § 2-701 cmt. (pre-1990 art. 2). (The Model Probate Code failed to deal at all with contracts to make wills.)

<sup>77</sup> See 2 PAGE, *supra* note 11, §§ 21.33, 22.3. See *infra* note 131 and accompanying text.

testator, either to hang on to her present Volkswagen, sell it, or trade it in for a Mercedes. Though they will have affected her estate plan, these decisions will not have been formalized by any subsequent executed writing. In other words, the testator will have altered her estate plan *without* complying with the Statute of Wills.

How could lawmakers deal with such a case? One possibility would be to treat subsequent (unexecuted) acts as equivalent to unexecuted words and on that basis refuse to give effect to any change of estate plan premised upon them. If the testator owned a Volkswagen at the time her will was executed, that (or its monetary equivalent) is what her beneficiary would receive at her death. Alternatively, lawmakers could deem acts effective to alter wills (thus distinguishing acts from words). In that event, the terms of the bequest would operate to give the beneficiary whatever automobile was actually discovered among the decedent testator's personal effects.

In fact, the law of wills follows neither course: its move is altogether stranger, more troublesome to apply, and from a policy perspective affirmatively perverse. What the law of wills dictates is that acts of *independent significance*—that is, acts performed in order to accomplish lifetime motives of the testator—are effective to alter an estate plan. If the testator's purpose in selling her car or in buying a new one is to alter her own standard of living, then the act *does* operate to alter her will; whereas if the act has no significance for the testator apart from its effect on the estate plan—that is, if the act is performed solely in order to accomplish a change of estate plan—then such act is *ineffective* to do so. Were a will to specify, for example, that A is to receive the testator's automobile *unless it is tagged with a black label*, the act of affixing the label, presumably carried out for no other reason than to extinguish the bequest, will not be effective to alter the will. In other words, lawmakers distinguish *communicative* from *non-communicative* acts. Those acts which the testator conceives as the equivalent of words must be properly executed in order to satisfy the Statute of Wills. Those acts which the testator does not so conceive need not be so formalized.<sup>78</sup>

We may notice preliminarily that to draw a distinction such as this is to open a sizable can of worms, for the communicative significance of acts is deeply ambiguous. Every act both affects and asserts.<sup>79</sup> Courts have wrestled

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<sup>78</sup> The doctrine of acts of independent significance has not been the subject of modern policy analysis. For doctrinal discussions, see ATKINSON, *supra* note 30, § 81; MCGOVERN ET AL., *supra* note 8, § 6.3, at 252; 2 PAGE, *supra* note 11, § 19.34.

<sup>79</sup> Our vocabulary acknowledges the point by setting aside a special term for communicative acts, which we call *gestures*. For a theoretical discussion, see PIERRE FEYEREISEN & JACQUES-DOMINIQUE DE LANNOY, *GESTURES AND SPEECH: PSYCHOLOGICAL INVESTIGATIONS* (1991). The principle is also understood deeply, if unsystematically, by

with the same elusive distinction in several other arenas, including the protection of acts under the First Amendment and the coverage of "non-verbal conduct intended as an assertion" under the hearsay rule, with little clarity or consistency.<sup>80</sup> Determining whether a testator performed an act in order to change her life or her will when the answer could very well be yes and yes is often impossible and hence can lead to arbitrary results.<sup>81</sup>

Putting such difficulties to one side, the substantive effect of the doctrine of acts of independent significance is no less troublesome. Notice the perversity of what lawmakers are prescribing here. On the one hand, they are telling the testator that if she seeks to alter her will by act she cannot do so. All efforts to change an estate plan must comply with the requisite statutory formalities.<sup>82</sup> On the other hand, if the testator *does not* intend her act to alter her estate plan,

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salespersons and advertisers, who may urge you (as the current pitch goes) to "say it with flowers." We have already noticed that this same duality exists for words. See *supra* note 15 and accompanying text. For a further theoretical discussion (by comparison) of the ambiguity between communicative and performative speech, see AUSTIN, *supra* note 15, at 94-147.

<sup>80</sup> Discussing the First Amendment cases: "[A]ny particular course of conduct may be hung almost randomly on the 'speech' peg or the 'conduct' peg as one sees fit . . . , so the distinction between speech and conduct must be seen at best as announcing a conclusion of the Court, rather than as summarizing in any way the analytic processes which led the Court to that conclusion." LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-7, at 827 (1978); see also, e.g., Stephanie M. Kaufman, Note, *The Speech/Conduct Distinction and First Amendment Protection of Begging in Subways*, 79 GEO. L.J. 1803, 1821-22 & n.128 (1991). Discussing the hearsay rule: "The difficulty inherent in determining whether the actor intended to assert the matter his conduct is offered to prove is well illustrated by the conflicting manner in which the [academic] writers have interpreted the same fact situations." Ted Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 STAN. L. REV. 682, 687 n.16 (1962). The problem also arises within contract law, where an act may or may not signal an offer and/or acceptance of a contract. Agreements thus formed are known as contracts implied-in-fact. The ambiguity of acts has been recognized in this context as well. See 1 CORBIN, *supra* note 29, § 18.

<sup>81</sup> See, e.g., *Smith v. Weitzel*, 338 S.W.2d 628, 637 (Tenn. Ct. App. 1960) (holding that the act of placing stock certificates in envelopes bearing the names of intended beneficiaries and then placing the envelopes in a lockbox had independent significance); cf. *Hastings v. Bridge*, 166 A. 273, 273-74 (N.H. 1933) (dicta disputing this ruling in analogous cases). Of course, what appears an arbitrary exercise to one observer may seem an expedient space for judicial discretion to another. Professors Atkinson and Page both appear to have been drawn to the latter view. See ATKINSON, *supra* note 30, § 81, at 397; 2 PAGE, *supra* note 11, § 19.34, at 119.

<sup>82</sup> "If the will . . . contemplates a further dispositive act, the latter act should be in writing and duly executed." Alvin E. Evans, *Incorporation by Reference, Integration, and Non-Testamentary Act*, 25 COLUM. L. REV. 879, 895 (1925).

then she *can* do so.<sup>83</sup> Under the doctrine, then, a testator can alter her will by act, so long as she does not do so *on purpose*. A curious outcome, to say the least, when one bears in mind that lawmakers have exalted effectuation of intent as the guiding principle of inheritance law.<sup>84</sup>

But perhaps this analysis is a trifle too clever. If one can safely assume under the doctrine that any act intended to alter an estate plan will be given effect so long as it *also* has independent significance,<sup>85</sup> then a possible rationale for the rule's configuration begins to emerge. Consider again the functions of the Statute of Wills. If an act has independent significance for the testator, is there likely to be better *evidence* of the testator's intent? Not necessarily: acts can have an impact on the testator's life whether they are performed in public or in private. If an act has independent significance for the testator, is it likelier that the testator sought to make a *legally effective* change in her estate plan? Here we may be on to something, for acts which affect the testator's life cannot be taken as cavalierly as acts which do not, hence they could indicate greater evidence of her legal resolve. Consider again a bequest of "whatever automobile I own at my death." If the testator does intend to disinherit her beneficiary when she sells her car, the requirement that she go to the trouble of altering her life-style in order to do so, absent a new executed writing, may suffice to demonstrate the finality of her intent. By contrast, an act with no independent significance—such as affixing a label—can be undertaken more tentatively. At the same time, however, the doctrine has an underside: for when an act has independent significance for the life of the testator, the risk is that much greater that her *sole* motivation was to alter her own life-style and that any change of estate plan that follows from the act—say, of selling her car—was inadvertent. She may have wanted her beneficiary to receive a car at her death and simply failed to anticipate that she might no longer own one at that time. The danger of inadvertence recedes, by contrast, when the act in question *lacks* independent significance, only to be replaced by questions of

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<sup>83</sup> Since the event does not happen for the purpose of implementing the will the policy underlying the requirement of the Statute of Wills is not applicable. Even though the future act is within the testator's control, it does not appear that such an act should be denied effect if the testator did not thereby intend to supplement his will.

Alvin E. Evans, *Nontestamentary Acts and Incorporation by Reference*, 16 U. CHI. L. REV. 635, 636 (1949).

<sup>84</sup> See *infra* notes 170–72 and accompanying text.

<sup>85</sup> Professor Page makes this assumption, which certainly appears essential to explain the outcomes of the extant cases, though the point is unclear as a matter of formal doctrine. See 2 PAGE, *supra* note 11, § 19.34, at 119; cf. 1A AUSTIN W. SCOTT, THE LAW OF TRUSTS § 54.3, at 32 (William F. Fratcher ed., 4th ed. 1987 & Supp. 1995) (asserting that if the independent significance is insubstantial it should fail to suffice).

resoluteness. Compare the two scenarios: (1) "I bequeath to A whatever automobile I own at my death." (2) "I bequeath to A my automobile, unless I have attached to it a black label." The act of selling the car is (probably) effective to eliminate the bequest under present law. The act of affixing a label to the car (probably) is not. Is testamentary intent more likely to be effectuated in the first case than in the second? Myself, I doubt it, but who knows?

Whether acts should be treated like words for purposes of testation is ultimately difficult to say. Arguably, persons can be expected to act somewhat less lightly than they speak; actions, as we say, speak louder than words. Lay persons know that acts are performative. And even a purely symbolic act like tagging a car is not routine, hence the testator is more likely to be impressed with the legal effect of the act than when she is merely discussing the matter.<sup>86</sup> On the other hand, evidence of acts may be no easier to come by than evidence of words when performed out of the presence of witnesses.

At any rate, having established a rule to resolve this dilemma, be the solution no less problematic than the problem itself, lawmakers have not even applied their problematic solution in a consistent manner. Venture for a moment from the realm of will execution to the realm of will revocation. These two processes are in fact opposite sides of the same coin, for both operate to alter a testator's estate plan. Yet, under the law of all fifty states, a testator can revoke her will by subsequent executed writing—or *by act*! By canceling or destroying the document with intent thereby to revoke it, the testator accomplishes the revocation of her will.<sup>87</sup> Note well what is entailed here: the act of defacing the will alters the testator's estate plan—yet that act *has absolutely no significance apart from its effect on the estate plan*. Here, a purely symbolic act, carried out for no other purpose than to accomplish a legal result, is given effect despite the failure to comply with the Statute of Wills. Viewed comparatively, the doctrine of revocation by act appears contrary to, or constitutes an exception under, the doctrine of acts of independent significance.

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<sup>86</sup> Cf. U.C.C. § 9-203(1)(a) (1994) (permitting a security interest to be formalized between debtor and secured creditor either by signed writing *or* by the act of transferring possession of the collateral to the secured creditor). Symbolic gestures had a place in western legal tradition and popular culture from the beginning. For a discussion, see Bernard J. Hibbitts, *Making Motions: The Embodiment of Law in Gesture*, 6 J. CONTEMP. LEGAL ISSUES 51 (1995).

<sup>87</sup> See MCGOVERNET AL., *supra* note 8, § 5.2. In most, though not all, jurisdictions, a testator can even revoke individual bequests within a will by act without revoking the entire will. See *id.* § 5.2, at 211–13. On the historical origins of revocation by act, a practice given effect in England apparently from the beginning and first codified under the Statute of Frauds of 1677, see 2 PAGE, *supra* note 11, §§ 21.2–3. For a sixteenth-century discussion, recognizing the validity of revocation by act, see SWINBURNE, *supra* note 25, at 270a–272.

Possibly this exception can find justifications in public policy.<sup>88</sup> *Arguendo*, the ritual mandated for revocation by act is more unequivocally indicative of intent to be performative than are other ritualistic acts. Here, the act required of the testator in order for legal consequences to ensue is irreversible (at least by a further act, unlike affixing a label to a car, which could be removed and then reaffixed at the testator's whim), and that act also is performed upon the legally significant document itself.<sup>89</sup> But is the legal effect of this act truly more manifest than when the testator sets out in an initial executed writing what subsequent acts (*e.g.*, labelling) are to be effective to alter her will *and then proceeds to perform them*? Certainly, the risk of fraud or evidentiary insufficiency is precisely the same in the two cases. Ultimately, the differences here may strike the mind as less pronounced than the similarities.<sup>90</sup>

Whether convincing or no, the distinctions just drawn between revocation by act and other acts comprise at best a *post hoc* rationalization. The fact remains that commentators and lawmakers alike have never drawn any comparison between these two bodies of legal doctrine and hence have failed even to come upon, let alone come to grips with, the inconsistency between

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<sup>88</sup> One suggested reason for permitting revocation by act is the very fact that it is an entrenched cultural practice. For an early discussion defending revocation by act (as well as other aspects of inheritance law) on this basis, see Sugden, *supra* note 31, at 7, 19, 23, 32 ("Run not counter to the habits of the People."). The argument has recently been reiterated in LAWRENCE W. WAGGONER ET AL., *FAMILY PROPERTY LAW* 253 (1991). See also McGovern, *Payable on Death Account*, *supra* note 39, at 13-14 (noting the argument in connection with will substitutes); Mechem, *supra* note 38, at 503 (making the argument in connection with will execution). There is merit to this reasoning: citizens follow social norms, and enactment of conflicting legal norms is bound to cause error and confusion. Still, where public policy suggests the expediency of a *change* in social norms, error and confusion in the interim may—or may not—be deemed a price worth paying. Discussing this dilemma in a different doctrinal context, see Hirsch, *Inheritance and Bankruptcy*, *supra* note 63, at 192-93. See also *infra* notes 294-95 and accompanying text.

<sup>89</sup> Compare the requirement of an *act* of delivery to render an *inter vivos* gift effective: here again, the act required to manifest performative intent involves the transaction itself (namely the gift corpus), it is irreversible (at least without breach of the peace), and it conforms with cultural norms. At the same time, the act of handing over property to another party *does* have independent significance for the donor. Discussing the policy underlying the delivery requirement, see Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments* (pt. 1), 21 ILL. L. REV. 341, 345-52 (1926).

<sup>90</sup> Defending revocation by act in the sixteenth century, Henry Swinburne cast his argument in general terms. "An other of the meanes whereby the testament which was good at the beginning, is afterwards made voide, is the canceling or cutting of the testament," Swinburne observed, "for the will and meaning of a man is no lesse shewed by his deedes then by his woords." SWINBURNE, *supra* note 25, at 270a.



them. In separate sections, the Uniform Probate Code endorses the traditional doctrines of acts of independent significance *and* of revocation by act. Only one of these sections is accompanied by a comment, which makes no mention of or reference to the other.<sup>91</sup>

## 2. Acts and Substance

Given, at any rate, the undoubted legal authority of the testator to revoke her will by act, questions can arise about the substantive effect on the estate plan induced by that act. Of course, if a testator has a single testamentary instrument, the consequence intended by revoking that instrument is unequivocal: the testator seeks to become intestate. Where, however, a string of executed documents exists and the testator intentionally incinerates only one of them, the estate plan we are left with after the smoke clears is not self-evident.

The problem emerges in two essential contexts: a testator may execute two instruments sequentially and then revoke by act only the *first* one; or a testator may execute two instruments sequentially and then revoke by act only the *second* one.<sup>92</sup> What effect does she intend her act to have on the legal operativeness of the other document? Curiously enough, depending on the circumstances, the act can be interpreted either to deprive the other document of legal force, *or the opposite*—to reinstate with legal force a document previously deprived of it. Alternatively, the act could be considered to have no legal effect whatsoever on any document other than the one directly acted upon. And that, ultimately, is the rub: for once we permit an act to substitute for executed words, both the testator's intent to render that act legally performative *and the substantive outcome she intended thereby* may be impossible to infer. Acts, alas, are ambiguous in more ways than one.<sup>93</sup>

Consider first the problem arising when a testator revokes by act the first of two sequential documents. Here, lawmakers have distinguished cases where the two instruments are substantively connected (a will together with a codicil

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<sup>91</sup> See UNIF. PROBATE CODE, *supra* note 5, §§ 2-507(a)(2), 2-512 (by negative implication); *id.* app. VII, §§ 2-507(2), 2-512 (pre-1990 art. 2). The Model Probate Code permitted revocation by act, but failed to deal with the doctrine of acts of independent significance. See MODEL PROBATE CODE, *supra* note 5, § 51(b).

<sup>92</sup> A third possibility is that the testator executes two or more duplicate instruments simultaneously and then revokes by act only one of them. The uniform rule applied in such a case is that the revocation by act of a single executed will conclusively revokes the duplicate executed documents by implication. See ATKINSON, *supra* note 30, § 86, at 442-43.

<sup>93</sup> Which is not of course to say that words cannot also be ambiguous in their substantive purport, a problem taken up in Part III of this Article.

to that will) and those where they are substantively disconnected (a will followed by another complete will). Where a testator executed one will and replaced it with a second will (thereby revoking the first by virtue of its temporal priority<sup>94</sup>), and the testator now destroys the initial, superseded will by act, the law is crystal clear: the act of destroying an instrument which was already revoked effectively is superfluous and has no effect on the second testamentary instrument. Where, however, the testator executed a will followed by a *codicil* to that will, and the testator now revokes the initial will by act, the legal effect of that act on the second, substantively connected instrument has been treated variously by the few courts that have faced the issue.<sup>95</sup> Several courts have given narrow effect to the statute authorizing revocation by act: The statute provides that the document destroyed is the document revoked, making no provision for revocation of an associated document by implication. On that basis, the subsequent codicil, like a subsequent will, has been held unaffected by the destruction of the prior document.<sup>96</sup> In some other jurisdictions, however, by additional statutory provision, the revocation of a will by act conclusively revokes all codicils to that will.<sup>97</sup> And in still other jurisdictions which lack such explicit statutory provisions, courts have declined to read narrowly general statutory authorizations for revocation by act; in these states, the issue has turned on whether the codicil is substantively "independent" of the will,<sup>98</sup> a property nowhere well defined, but one that can be clarified in these states by extrinsic evidence of testamentary intent.<sup>99</sup>

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<sup>94</sup> This sort of revocation is known technically as revocation by subsequent executed writing.

<sup>95</sup> See ATKINSON, *supra* note 30, § 86, at 443; 2 PAGE, *supra* note 11, § 21.17; Martha B. Allen, Note, *Presumptive Revocation of Lost Will—Effect on Codicil*, 16 U. CIN. L. REV. 346 (1942); Roger W. Kapp, Comment, *Wills—Revocation by Act to the Document—Effect on Codicil*, 60 MICH. L. REV. 82 (1961); R.L. Martyn, Annotation, *Revocation of Will as Affecting Codicil and Vice Versa*, 7 A.L.R.3d 1143, 1146-53 (1966).

<sup>96</sup> The clearest statement to this effect appears in *In re Sapery*, 147 A.2d 777, 782 (N.J. 1959); see also *In re Brown's Will*, 160 N.Y.S.2d 761 (Surr. Ct. 1957) (lacking explicit analysis). Advocating this position as a matter of statutory construction, see ATKINSON, *supra* note 30, § 86, at 443; 2 PAGE, *supra* note 11, § 21.17, at 373-74; Allen, *supra* note 95, at 348; Kapp, *supra* note 95, at 88-90, 93-95.

<sup>97</sup> At present, four jurisdictions have statutes to this effect. See FLA. STAT. ANN. § 732.509 (West 1995); N.Y. EST. POWERS & TRUSTS LAW § 3-4.1 (McKinney 1981 & Supp. 1996); OKLA. STAT. ANN. tit. 84, § 113 (West 1990 & Supp. 1996); S.D. CODIFIED LAWS ANN. § 29-3-9 (1994). In one additional jurisdiction, by statute, the presumption that the revocation of a will revokes all of its codicils is rebuttable. See WASH. REV. CODE ANN. § 11.12.080 (West 1987 & Supp. 1996).

<sup>98</sup> Many of the cases are addressed in Kapp, *supra* note 95, at 90-93.

<sup>99</sup> E.g., *Smith's Estate*, 2 Pa. C. 626, 627-28 (1887); *Youse v. Forman*, 68 Ky. (5

The Uniform Probate Code fails to deal with this issue at all. It is a lacuna in the Code.<sup>100</sup>

Regarding the reverse problem, where the testator revokes by act the *second* of two instruments, even greater confusion, or more properly diffusion, reigns.<sup>101</sup> Here, the question is whether the act of revoking a later testamentary instrument *revives* the terms of the prior instrument (which the later instrument, now gone, had previously superseded). A very few states, following the old English common law, answer *yes*: the eventual revocation (by act) of a second instrument that had earlier revoked by subsequent executed writing a prior instrument conclusively reinstates the terms of the prior instrument.<sup>102</sup> Other states, following the British Wills Act of 1837, answer *no*: having been revoked by subsequent executed writing, the prior will cannot be reinstated

Bush) 337, 347-49 (1869). *See also supra* note 97 (citing the Washington statute). Some courts have failed to address the issue of extrinsic evidence. *Cf. In re Halpern's Estate*, 224 N.Y.S.2d 58, 59 (Surr. Ct. 1962); *In re Emmons' Will*, 96 N.Y.S. 506, 509 (App. Div. 1906) (which may be read to imply that extrinsic evidence is inadmissible). The English courts, too, were in conflict on the whole question. *See* 2 PAGE, *supra* note 11, § 21.17, at 372-73.

<sup>100</sup> This was true of the original Uniform Probate Code of 1969 and remains true of the revised version of 1990. The Model Probate Code, by contrast, included a conclusive presumption that the revocation by act of an initial will has no effect on any subsequent "will, nor any part thereof." *See* MODEL PROBATE CODE, *supra* note 5, § 54 (by implication). Thus the Model Probate Code, at least, treated the two scenarios symmetrically.

<sup>101</sup> "It is unfortunate that there should be so great a conflict of authority upon a question which is frequently of such vital importance . . ." 2 PAGE, *supra* note 11, § 21.54, at 442. *See also* W.F. Zacharias & G. Maschinot, *Revocation and Revival of Wills* (pt. 3), 26 CHI.-KENT L. REV. 107, 146 (1948) ("... an almost kaleidoscope pattern . . .").

<sup>102</sup> This assumes that the original testamentary instrument was not (like the second instrument) revoked independently by act. The few jurisdictions that take this view have done so by case law. The common law rule is not codified in a single jurisdiction (but 11 states have no statute on point). *See, e.g.,* Peck's Appeal from Probate, 50 Conn. 562 (1883). The notion of revival might find a basis in formal logic, where the double negative yields a positive (though not the reverse: the double positive does not yield a negative, and hence republication of a still-valid will does not result in revocation; but is this asymmetry of formal logic logical? On the lighter side of this vexed question, see Taylor Branch, *New Frontiers in American Philosophy*, N.Y. TIMES, Aug. 14, 1977, § 6 (Magazine), at 12, 46). But in fact, this result under the common law had naught to do with formal logic (which had yet to be invented), but stemmed rather from the notion that a revocation, like a devise, took legal effect only upon death; if the testator revoked a subsequent will during her lifetime, then the subsequent will never had a legal existence and the initial will remained valid. *See* 2 PAGE, *supra* note 11, § 21.51.

except by formal re-execution; any acts taken with respect to the subsequent executed writing are irrelevant.<sup>103</sup> And still other states, following the rule of the old English ecclesiastical courts, admit extrinsic evidence to clarify the testator's intent in this situation, either (as under the original rule) without any presumption or (more commonly today) with a rebuttable presumption one way or the other.<sup>104</sup> What is more, even within a given jurisdiction, the determination of which of these several alternatives applies differs in some states depending (once again) on whether the second, revoking instrument that is itself revoked in turn was a will or a codicil.<sup>105</sup>

Different outcomes premised on this last distinction also appear in the revised version of the Uniform Probate Code. Under the original version of the Code, symmetry was maintained: an original will, whether revoked *completely* by a subsequent will or *partially* by a subsequent codicil, was presumed to remain revoked despite the later revocation of the subsequent instrument unless extrinsic evidence showed that the testator intended the contrary.<sup>106</sup> The

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<sup>103</sup> Seventeen jurisdictions currently follow this scheme by statute; the rule is sometimes known as "anti-revival." It in fact appeared in the New York Revised Statutes of 1830 before it was adopted in Great Britain, although the impact of New York's legislation on Parliament, and the comparative influence of the two statutes on other American states, remains unclear. See Ferrier, *supra* note 30, at 266-70.

<sup>104</sup> Rebuttable presumptions exist in all jurisdictions where the law has been codified, but the old ecclesiastical court rule is established by precedent in a few jurisdictions lacking statutes on point. See, e.g., *In re Gould's Will*, 47 A. 1082 (Vt. 1900). In still another variation, a few states distinguish between subsequent wills which do or do not contain express revocation clauses, holding such clauses to revoke prior wills conclusively, irrespective of the subsequent will's revocation. See, e.g., GA. CODE ANN. § 53-2-73 (Michie 1995); *Hawes v. Nicholas*, 10 S.W. 558 (Tex. 1889) (no statute on point). On the public policy of this distinction, compare 2 PAGE, *supra* note 11, § 21.54, at 443 (applauding it) with *Palmer L. Hall, Revival by Revocation of a Later Instrument—Effect of a Revocatory Clause*, 28 KY. L.J. 227, 229 (1940) (criticizing it).

<sup>105</sup> For statutes distinguishing the outcome of a revocation of a codicil from the revocation of a subsequent will, see ARIZ. REV. STAT. ANN. § 14-2509 (1995) (reverse rebuttable presumptions); FLA. STAT. ANN. §§ 732.508(1), 732.508(2) (West 1995) (reverse presumptions, one rebuttable and the other conclusive); ILL. REV. STAT. ch. 755, para. 5/4-7 (West 1992) (reverse conclusive presumptions); MONT. CODE ANN. § 72-2-529 (1995) (reverse rebuttable presumptions); N.M. STAT. ANN. § 45-2-509 (Michie 1994) (same); WASH. REV. CODE ANN. § 11.12.080 (West 1987 & Supp. 1996) (same); WIS. STAT. ANN. § 853.11 (West 1991 & Supp. 1995) (same). In no jurisdiction does the revocation of a codicil operate to revoke fully the prior will that it modified. See 2 PAGE, *supra* note 11, § 21.18.

<sup>106</sup> See UNIF. PROBATE CODE, *supra* note 5, app. VII, § 2-509(a) (pre-1990 art. 2). The Model Probate Code had also treated the revocation of subsequent wills and codicils symmetrically, though in a different manner: following the British Wills Act of 1837, the

revised Code treats subsequent wills and codicils differently. When a will is entirely superseded by a subsequent will that the testator eventually revokes, the Code continues to presume an intent *not* to revive the original will unless extrinsic evidence shows otherwise. But when a will is partially superseded by a subsequent codicil that the testator eventually revokes, the rebuttable presumption flip-flops: now an intent to revive the original will *is* presumed, unless contradicted by extrinsic evidence.<sup>107</sup>

What rules ought to govern these two core problems? None, alas, can be fool-proof: for the effect intended by a testator's act of revoking one document when a second one exists is destined to vary from case to case. Even the admission of extrinsic evidence on the question is double-edged, allowing for a case-by-case determination of intent but also potentially opening the door to fraud (as well as costly litigation).<sup>108</sup> Still, that door is just slightly ajar: here,

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revocation of a subsequent will or codicil was deemed conclusively not to revive the prior document (extrinsic evidence being barred). See MODEL PROBATE CODE, *supra* note 5, § 55. The drafters of the original Uniform Probate Code were of several minds on the question of revival, and they tossed about a variety of, sometimes novel, schemes. See UNIF. PROBATE CODE § 248 (First Reporter's Draft, Aug. 1966); *id.* § 2-508 & cmt. (Summer Draft, July 14, 1967); *id.* § 2-508 & cmt. (Fourth Working Draft, Second Tentative Draft, July 22-Aug. 1, 1968); *id.* § 2-509 & cmt. (Fifth Working Draft, n.d., c. 1969).

<sup>107</sup> See UNIF. PROBATE CODE, *supra* note 5, § 2-509(a) & (b). See generally Robert Whitman, *Revocation and Revival: An Analysis of the 1990 Revision of the Uniform Probate Code and Suggestions for the Future*, 55 ALB. L. REV. 1035 (1992). Under a strictly textual reading of this section, extrinsic evidence is admissible to show only an intent not to revive that portion of the will that the codicil superseded. *Ex hypothesi*, extrinsic evidence is inadmissible to show that a testator sought by revoking a codicil to revoke the *entire* will that it modified. See UNIF. PROBATE CODE, *supra* note 5, § 2-509(b); see also *id.* app. VII, § 2-509(a) (pre-1990 art. 2); *supra* note 105. Yet, if extrinsic evidence is credible for one purpose, why not for the other?

<sup>108</sup> "No rule can be worked out which will avoid the dangers of oral evidence on the one hand and which will give effect to the actual intention of the testator in the particular case, on the other." 2 PAGE, *supra* note 11, § 21.54, at 443. Some courts and commentators have emphasized the dangers inherent in admitting extrinsic evidence on the question of revival of wills. See, e.g., *Bailey v. Kennedy*, 425 P.2d 304, 306-07 (Colo. 1967); 2 PAGE, *supra* note 11, § 21.54, at 443; Report of Revisers of N.Y. Statutes of 1827-28, quoted in *Ferrier*, *supra* note 30, at 267; W.F. Zacharias & G. Maschinot, *Revocation and Revival of Wills* (pt. 1), 25 CHI.-KENT L. REV. 185, 213-14 (1947); *infra* note 111. But see Gail B. Bird, *Revocation of a Revoking Codicil: The Renaissance of Revival in California*, 33 HASTINGS L.J. 357, 377 & n.122 (1981) (arguing that to bar extrinsic evidence may invite fraud if a presumption against revival also applies, by allowing heirs to offer unanswerable perjury as to the existence of a subsequent-but-missing will for purposes of establishing the revocation of the surviving will); Mechem, *supra* note

the only question before the court would be the intended effectiveness *vel non* of documents executed once upon a time by the testator.<sup>109</sup>

At any rate, not to admit extrinsic evidence in these two situations makes for an odd comparison with the general application of revocation by act. Under that doctrine, the rules for determining whether a single testamentary instrument was destroyed with intent thereby to revoke it set out rebuttable, not conclusive, presumptions; extrinsic evidence is universally admissible to determine whether the testator possessed the requisite *animus*.<sup>110</sup> If extrinsic evidence is admissible to show what effect the testator intended her act to have on the particular document that was acted *upon*, ought not that same evidence also be admissible to show what effect the act was intended simultaneously to have on *other* documents? Extrinsic evidence seemingly is as reliable (or unreliable) for the one purpose as for the other.<sup>111</sup> Yet, many jurisdictions do bar evidence on the latter issue, as we have observed.<sup>112</sup> What is more, the

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38, at 511 (opining that extrinsic evidence "will probably be trustworthy more often than not whereas any arbitrary rule, one way or the other, gives [the testator] no more than an even break"). On the potential of extrinsic evidence to breed litigation, see *supra* note 32.

<sup>109</sup> "Although such evidence may occasionally result in the probating of a will which, since its original revocation, the testator never actually intended should be effective, it will not permit of the establishment of a testamentary disposition which he never at any time desired." Ferrier, *supra* note 30, at 273; Mechem, *supra* note 38, at 511.

<sup>110</sup> See MCGOVERN ET AL., *supra* note 8, § 5.2, at 213-14.

<sup>111</sup> This analogy was drawn by Professor Mechem (see Mechem, *supra* note 38, at 511) and a generation later by a cohort of the Reporters of the original Uniform Probate Code, who sought to make extrinsic evidence admissible to resolve ambiguities concerning the effect intended by acts; but other Reporters opposed the admissibility of extrinsic evidence in this situation on the ground that its use "permits fraud in some cases." UNIF. PROBATE CODE § 2-508 cmt. (Summer Draft, July 14, 1967), repeated in *id.* § 2-508 cmt. (Third Working Draft, Nov. 1967); cf. *id.* § 2-508 cmt. (Fourth Working Draft, Second Tentative Draft, July 22-Aug. 1, 1968) (debating the issue back and forth). This debate, along with the useful analogy raised in the course of it, was banished from the Code as ultimately adopted. With the above comments, compare UNIF. PROBATE CODE, *supra* note 5, app. VII, § 2-509 cmt. (pre-1990 art. 2). See also Ferrier, *supra* note 30, at 272 (pointing out that extrinsic evidence is admissible to clarify latent ambiguities created by words, as opposed to acts, by analogy).

<sup>112</sup> See *supra* notes 96-97, 102-03 and accompanying text. Also troubling is the comparison between strict revival or anti-revival rules and the common-law doctrine of dependent relative revocation. Under the latter doctrine, if evidence shows that a testator was mistaken about the legal effect of revoking a subsequent instrument, the court can deem that act of revocation constructively to have been conditioned upon it having the effect the testator anticipated; and if it does not, given the law of revival or anti-revival operating in the jurisdiction, the court can invalidate the revocation of the subsequent instrument (the fictional condition attached to that revocation, that it have the desired effect, not having

issue has not even been treated with internal structural consistency. Some jurisdictions that bar extrinsic evidence when the testator revoked by act the first of two documents permit such evidence when she instead revoked the second of two documents.<sup>113</sup> And in some jurisdictions, the admissibility of extrinsic evidence to show what effect the testator intended the revocation by act of one document to have on the other document turns on whether they were two separate wills or will and codicil.<sup>114</sup> Surely within *these* parameters,

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been met), if the court finds that to do so would result in an estate plan closer to the testator's intent. For example, if a testator revoked a subsequent will under the mistaken belief that it would revive her original will, and the jurisdiction applies an anti-revival rule presuming conclusively that the original will was intended *not* to be revived, the court could invalidate the revocation of the subsequent will if it provided for an estate plan closer to the will that the testator wished to revive than to the intestacy statute. Extrinsic evidence is admissible to demonstrate such a mistake under the doctrine of dependent relative revocation. *E.g.*, *In re Estate of Alburn*, 118 N.W.2d 919 (Wis. 1963); *see generally* 2 PAGE, *supra* note 11, §§ 21.57-65. Notice, then, the anomaly: under the doctrine of dependent relative revocation, courts are free in most jurisdictions to admit, and may choose to rely on, extrinsic evidence to show that a testator intended, by virtue of her act of revocation, to put into effect a particular estate plan—not to implement judicially that estate plan, but to undo a revocation that, given the conclusive presumption concerning its effect imposed by state law, moves her farther away from the estate plan she anticipated. Yet, extrinsic evidence is equally reliable for, and might just as well be admitted for, the purpose of effectuating the precise intent of the testator. Also drawing this analogy, *see* UNIF. PROBATE CODE § 2-508 cmt. (Summer Draft, July 14, 1967), *repeated in id.* § 2-508 cmt. (Third Working Draft, Nov. 1967).

<sup>113</sup> When a will is followed by a subsequent will, all jurisdictions bar extrinsic evidence to show what effect a testator intended revocation by act of the first will to have on the effectiveness of the second will, whereas some twenty jurisdictions admit extrinsic evidence to show what effect a testator intended revocation by act of the second will to have on the effectiveness of the first will. When a will is followed by a codicil, at least one jurisdiction has admitted extrinsic evidence to show what effect revocation of the will was intended to have on the codicil but at the same time bars extrinsic evidence to show what effect revocation of a codicil was intended to have on the will. *Compare* *Youse v. Forman*, 68 Ky. (5 Bush) 337, 347-49 (1869) (no statute on point) *with* KY. REV. STAT. ANN. § 394.100 (Michie 1994). *E contra*, at least two other jurisdictions bar extrinsic evidence to show what effect revocation of a will was intended to have on the codicil but admit extrinsic evidence to show what effect revocation of a codicil was intended to have on the will. *Compare* FLA. STAT. ANN. § 732.509 (West 1995) *with id.* § 732.508(2); *compare* S.D. CODIFIED LAWS § 29-3-9 (Michie 1994) *with id.* §§ 29-2-1, 29-3-6.

<sup>114</sup> Whereas all jurisdictions bar extrinsic evidence to show what effect revocation by act of an initial will is intended to have on a subsequent will, at least three jurisdictions admit extrinsic evidence to show what effect revocation by act of a will is intended to have on a codicil. *See supra* note 99. Florida bars extrinsic evidence to show what effect revocation by act of a subsequent will was intended to have on the initial will but admits

extrinsic evidence in all instances is equally reliable or unreliable. The distinctions some lawmakers have seen fit to draw in this regard appear as thoughtless as they are arbitrary.

That is not necessarily true when it comes to setting the legal presumptions (whether conclusive or rebuttable) that apply in these cases. To the extent lawmakers distinguish the effect that the revocation of an initial document has on a subsequent document from the effect that the revocation of a subsequent document has on an initial document, or distinguish the effect of revoking one of the two documents in a will-will sequence from the effect of revoking the analogous document in a will-codicil sequence, these "asymmetries" stand the test of reason if they correspond with distinctions that the typical testator would herself draw: for the object of these presumptions is to infer and then to implement the testator's probable intent, not to achieve some abstract ideal of symmetry.

But have lawmakers succeeded in this endeavor? Absent empirical evidence (which is expensive to come by) of what testators are most likely to intend by acts of revocation under different circumstances, lawmakers must rely on their intuitions when setting the operative presumptions. Just how canny those intuitions have been is questionable. Consider the distinction chiseled into the revised Uniform Probate Code between will-will and will-codicil sequences: If the testator revokes a codicil by act, the will (to the extent that it had been superseded) is presumptively revived; whereas, if the testator revokes a subsequent will by act, the prior will (that was wholly superseded) is presumptively *not* revived.<sup>115</sup> Will the naïve testator truly distinguish these two situations?<sup>116</sup> Certainly they can generate odd comparisons, in that a legal

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extrinsic evidence to show what effect revocation by act of a codicil was intended to have on a will. Compare FLA. STAT. ANN. § 732.508(1) (West 1995) with *id.* § 732.508(2).

<sup>115</sup> See *supra* note 107.

<sup>116</sup> Asserting that the distinction between wills and codicils in the context of revival is "illogical," and "arbitrary," see Bird, *supra* note 108, at 376, 378. Asserting that most ignorant testators probably intend to revive former documents when they revoke subsequent ones (be they wills or codicils), see UNIF. PROBATE CODE § 2-508 cmt. (Summer Draft, July 14, 1967) (repeated in several of the drafts that followed); Perry Evans, *Comments on the Probate Code of California*, 19 CAL. L. REV. 602, 611-12 (1931); Ferrier, *supra* note 30, at 273; see also *id.* at 271 (suggesting that this principle might be confined to those instances where the testator preserves the earlier document among her important papers); Peck's Appeal from Probate, 50 Conn. 562, 566-67 (1883) (inferring an intent to revive where the first will had been "carefully preserv[ed]"). But see Harwell v. Lively, 30 Ga. 315, 320-21 (1860) (suggesting that no inference is possible one way or the other); 2 PAGE, *supra* note 11, § 21.55, at 443 (suggesting that most testators do not expect a former will to be revived, especially when the subsequent will contained an express revocation clause); Report of Revisers of N.Y. Statutes of 1827-28, quoted in Ferrier, *supra* note 30, at 267, 272 & n.28



abyss yawns at the point where a codicil becomes will-like. Put the case:

*Scenario # 1:* Testator executes an initial will naming A as sole beneficiary and B as executor. Testator then executes a second instrument substituting C as sole beneficiary (but relying on the initial will provision concerning the executor). The second instrument constitutes a codicil; therefore, the testator's subsequent act of revoking the codicil is presumed, absent extrinsic evidence to the contrary, to reinstate the bequest of the entire estate to A.

*Scenario # 2:* Testator executes an initial will naming A as sole beneficiary and B as executor. Testator then executes a second instrument substituting C as sole beneficiary and D as executor. The second instrument constitutes a complete will; therefore, the testator's subsequent act of revoking the second will is presumed, absent extrinsic evidence to the contrary, *not* to reinstate the bequest of the entire estate to A.

The two scenarios appear *oh* so very similar that they should at least raise doubts about the wisdom of the rules as presently framed. The Commissioners' decision to create this asymmetry surely was not thoughtless, but neither is it corroborated by cogent reasoning, let alone a *soupçon* of supporting empirical evidence.<sup>117</sup>

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(suggesting that intestacy is the preferable inference, given uncertainty of intent). Noting an inconsistency between the anti-revival rule, where applied, and the doctrine permitting interlineations within holographs, see Ferrier, *supra* note 30, at 274.

<sup>117</sup> For an argument supporting greater use of empirical evidence in the drafting of probate codes, including the Uniform Probate Code, see Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 915-18 (1992). In justifying the instant asymmetry, the Commissioners argued that "[a]s revised, this section properly treats the two situations as distinguishable. . . . [W]here Will # 2 wholly revoked Will # 1, the testator understood *or should have understood* that Will # 1 had no continuing effect[.]. . . ." whereas, "where Will # 2 only partly revoked Will # 1, Will # 2 is only a codicil to Will # 1, and the testator knows (*or should know*) that Will # 1 does have continuing effect." UNIF. PROBATE CODE, *supra* note 5, § 2-509 cmt. (emphasis added). The difficulty with this reasoning is that it can be wheeled out to defend any default rule under the sun. Of course, a testator *should know* what effect the law will presume she intended by her act, but that fact does not point lawmakers in the direction of any one presumption as opposed to another. If they strive to effectuate intent, then the issue lawmakers must address when setting default rules is what intent the typical testator who *doesn't know* the law would expect her act to accomplish. That way, default rules are most likely to carry out the wishes of both informed and uninformed testators. Though the Commissioners employed no empirical evidence in the course of crafting § 2-509, they did use such evidence to good effect in some other segments of the Code. See *id.* §§ 2-102 cmt., 2-302 cmt. Most unfortunately, however, the Uniform Law Commission provides no funding for empirical research for its own drafting purposes. See Lawrence W. Waggoner, *The Uniform Probate Code Extends Antilapse-Type Protection to Poorly Drafted Trusts*, 94 MICH. L. REV. 2309, 2337 (1996).

### E. *Boundaries of Wills*

Along with the temporal problem of will revision comes a "spatial" problem of will execution: To wit, where does an estate plan end and material extrinsic to a will begin? Assuming that a testator has validly formalized her will, what substantive provisions are encompassed by that ritual? The simple answer, simply stated, is that any material intended to form a part of the will that is on hand when the will is executed becomes integrated into the will. The prudent testator will see to it that all pages and provisions are present and accounted for when the mass of documents setting out the estate plan come to be signed and witnessed. Sometimes, however, they are not, at which point the law must decide whether to give effect to provisions that the testator intended to implement when she executed her will but which are nowhere to be found within the executed writing.

Courts have grappled with this problem in two core settings. One is where the testator fails by mistake to include provisions within a will that she believed to be there. A section may be omitted due to a scrivener's error, for example, and the testator may fail to spot the mistake when she reviews the documents for signature. Can courts insinuate into a will provisions that the testator presumed to be contained therein, but that in fact are not?

Notice what raw materials we have to work with here. On the one hand, we know for a certainty that the testator sought to give performative effect to *some* estate plan, for she did proceed with the will execution ceremony. The difficulty concerns establishing the *terms* of that estate plan. In order to correct mistakes of omission, courts would have to evaluate extrinsic assertions concerning what words the testator believed she was executing, a problematic exercise that could either restore the accuracy of the estate plan or expose it to fraud. Cast into the traditional terminology of testamentary formality, giving effect to mistakenly omitted material would run counter to the evidentiary function, but not to the ritual function, of the statutory requirements for due execution.<sup>118</sup> Can courts do so? The answer is *no*: errors of omission cannot be

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<sup>118</sup> "If extrinsic evidence is admitted to explain testamentary intent [omitted from an estate plan] . . . , the risk of misinterpreting the testator's intent increases dramatically. Furthermore, admitting extrinsic evidence heightens the tendency to manufacture false evidence that cannot be rebutted due to the unavailability of the testator." *Espinosa v. Sparber*, 612 So. 2d 1378, 1380 (Fla. 1993) (addressing the issue in connection with a malpractice action against attorney-scrivener). An early English scholar viewed the issue in similar terms, asserting that the admission of extrinsic evidence in cases of mistake would be inconsistent with the law's insistence on proper execution:

corrected, either at common law or by recourse to equity.<sup>119</sup>

Whatever the intrinsic merits of such a rule,<sup>120</sup> it is, and has long been,

As the law requires wills . . . to be in writing, it cannot, consistently with this doctrine, permit parol evidence to be adduced, either to contradict, add to, or explain the contents of such will; and the principle of this rule evidently demands an inflexible adherence to it, . . . for it would have been of little avail to require that a will *ab origine* should be in writing, or to fence a testator round with a guard of attesting witnesses, if . . . its deficiencies might be supplied, or its inaccuracies corrected, from extrinsic sources.

1 THOMAS JARMAN, A TREATISE ON WILLS 502 (Raymond Jennings & John C. Harper eds., 8th ed. 1951) (1841-43). The two situations are not precisely analogous, however, in that a testator's failure to execute a will *at all* leaves it deficient in both evidence and ritual; whereas, a court confronted with an alleged clerical error faces a deficiency of evidence only.

<sup>119</sup> *E.g.*, *Knupp v. District of Columbia*, 578 A.2d 702 (D.C. 1990); *see also* *First Interstate Bank of Oregon v. Young*, 853 P.2d 1324 (Or. Ct. App. 1993) (refusing to admit extrinsic evidence to correct a mistaken omission where the scrivener could only offer notes and recollections, not a copy of an earlier version of the will, but declining to decide whether extrinsic evidence could ever be admitted to cure an omission). In a few cases, courts have corrected omissions under the guise of construction, sometimes with the assistance of equity. *See, e.g.*, *Greer v. Anderson*, 259 S.W.2d 550 (Tenn. Ct. App. 1953) (equity); *see also* *WAGGONER ET AL.*, *supra* note 88, at 565-66; *Joseph W. deFuria, Jr., Mistakes in Wills Resulting from Scriveners' Errors: The Argument for Reformation*, 40 CATH. U. L. REV. 1, 7 n.26 (1990). *But see* *In re Estate of Winslow*, 147 N.W.2d 814, 818-19 (Iowa 1967) (expressly rejecting a finding of ambiguity to cure a scrivener's error); *First Interstate Bank of Oregon*, 853 P.2d at 1327 (finding text of will unambiguous despite alleged mistaken omission). Treating the doctrine of clerical errors in wills generally, *see* *ATKINSON*, *supra* note 30, §§ 58, 60, at 274-77, 281-84; *McGOVERN ET AL.*, *supra* note 8, § 6.1, at 235-36; 1 *PAGE*, *supra* note 11, §§ 13.4-.5, 13.7-.8; 4 *id.* § 32.12; 4 *GEORGE E. PALMER, THE LAW OF RESTITUTION* § 20.1, at 156-58, 161-64 (1978 & Supp. 1996); 9 *JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE* § 2421(1)(a) (3d ed. 1940 & Supp. 1994).

<sup>120</sup> Obviously, the rule (like all other rules barring extrinsic evidence) is double-edged, filtering out of judicial consideration both accurate and potentially fraudulent evidence. Admission of extrinsic evidence also entails an administrative cost, in the form of added litigation. *See supra* note 32. Some courts have asserted that the risks entailed in admitting such evidence outweigh the benefits:

[I]t is against sound public policy to permit a pure mistake to defeat the duly solemnized and completely competent testamentary act. It is more important that the probate of the wills of dead people be effectively shielded from the attacks of a multitude of fictitious mistakes than that it be purged of wills containing a few real ones.

comparatively anomalous. Courts can correct clerical mistakes within written contracts, whether or not subject to the Statute of Frauds.<sup>121</sup> And even within the law of wills itself, courts have not enforced the ban on reformation consistently: for in the reverse situation, where material appears in a will that allegedly was *not* intended to be there—an error of inclusion, rather than omission—most modern courts will admit testimony disclosing that the testator signed the document in error and will strike provisions that were included by mistake.<sup>122</sup>

Note well that in both of these instances, courts have before them precisely

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*In re Gluckman's Will*, 101 A. 295, 296 (N.J. 1917);

[I]f the writing is to be contradicted by parol evidence, the object of the law will be defeated and all certainty destroyed. It is very common for scribes to make mistakes . . . . But, if these mistakes were to be corrected by the scrivener's recollection of his conversation with the testator, it would open such a door for perjury and confusion, as would render wills of very little use.

*Iddings v. Iddings*, 7 Serg. & Rawle 111, 112-13 (Pa. 1821). *But cf. supra* note 29. In addition, the rule could conceivably be justified as an *in terrorem* provision, encouraging greater care in reviewing testamentary documents *ex ante*, and hence helping to provide clearer evidence and more efficient proof of intent. *See In re Gluckman's Will*, 101 A. at 296 ("[A] testator may, by due care, avoid [scriveners' errors] in his lifetime."). *Cf. supra* note 30 and accompanying text. The tide of modern opinion is against the rule, however. *See infra* note 127.

<sup>121</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 61, §§ 155-56. Within contract law, this doctrine is of ancient lineage. But as Professor Wigmore points out, it held greater importance in times past, when literacy rates were lower. *See* 9 WIGMORE, *supra* note 119, §§ 2405, 2417. Likewise, under the law of inter vivos gratuitous transfers, including non-probate will substitutes, courts can correct clerical errors, both before and after the transferor's death. *See Loeser v. Talbot*, 589 N.E.2d 301 (Mass. 1992); *In re Estate of Vadney*, 634 N.E.2d 976 (N.Y. 1994); *Griffin v. Griffin*, 832 P.2d 810 (Okla. 1992); 4 PALMER, *supra* note 119, §§ 18.5, 18.7, 18.9. Likewise, under the law of statutory interpretation, courts have corrected clerical errors in legislation. *See United States Nat'l Bank of Oregon v. Independent Ins. Agents*, 113 S. Ct. 2173, 2186 (1993).

<sup>122</sup> *See supra* note 119. Where the clerical error is a *misdescription*—a combined omission (of the proper description) and inclusion (of a false description)—courts once again have only stricken, not corrected, the error. *See supra* note 119. But in some cases, again, courts have avoided this result, often (though not always) by misdescribing the misdescription as an ambiguity and correcting it under the rubric of construction. *See WAGGONER ET AL.*, *supra* note 88, at 572-73; *deFuria*, *supra* note 119, at 7 nn.25, 27. *But see* *McFarland v. Chase Manhattan Bank, N.A.*, 337 A.2d 1, 7 (Conn. Super. Ct. 1973) (explicitly rejecting this fiction), *aff'd*, 362 A.2d 834 (1975). By statute in Oklahoma, courts can correct misdescriptions, but not omissions from wills generally. *See OKLA. STAT. ANN.* tit. 84, § 174 (West 1990 & Supp. 1996).

the same evidentiary dilemma: given clear intent to render effective *some* document, courts must decide whether to search beyond its bounds to discover what it was, or what it was not, supposed to contain. In one case, courts do so; in the other, they do not. This asymmetry would appear to follow not from any shortness of sight, but rather from a rigidity of mind. Judges surely are not so blind as to have missed the structural connection between these twin scenarios.<sup>123</sup> But, they protest, the problem lies with the Statute of Wills, which permits courts to subtract executed language from a will but which bars them from adding any unexecuted language. They have simply made do with the remedial apparatus at their disposal, acting opportunistically to tackle those errors that are susceptible.<sup>124</sup> As a matter of substance, however, addition and subtraction are equivalent operations, insofar as both produce a modification of the estate plan as literally executed.<sup>125</sup> For courts to distinguish the two under the Statute of Wills is to press thoughtless formalism toward the brink of

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<sup>123</sup> Still, their myopia ought not be underestimated. Regarding scriveners' errors within other transactions, such as contracts, "[s]urprisingly, . . . few courts or commentators have focused on them as analogies to support the argument favoring a remedy for scriveners' mistakes in wills." deFuria, *supra* note 119, at 21. For one broadly comparative analysis of the law of mistake in wills, see John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982).

<sup>124</sup> See *Breckheimer v. Kraft*, 273 N.E.2d 468, 471 (Ill. App. Ct. 1971) (observing as a matter of law that "[a] mistake in description may be corrected by rejecting that which is shown to be false, but no words may be inserted in place of those stricken and no word or words may be supplied."); see also *Graves v. Rose*, 92 N.E. 601, 603-04 (Ill. 1910). Prior to the enactment of the modern, formalized Statute of Wills, ironically, this intellectual hurdle was easily crossed. In 1590, Henry Swinburne had no difficulty asserting that "if the writer [of a will] by error omit some wordes, whereby the sense is unperfect . . . the error of the writer ought not to prevaile against the truth of the testament: for the lawe presumeth that more was spoken, though lesse was written." SWINBURNE, *supra* note 25, at 190a.

<sup>125</sup> Subtraction of provisions from wills can have the effect of *adding* omitted terms, when the words stricken are words of limitation or qualification inserted by mistake. For example, if a will bequeathed "40 of my shares in X Corp. to A," limiting the size of the bequest by mistake, a court might strike the words "40 of" to restore the full bequest intended. Still more artfully, if a will bequeathed "to my children, A and B," omitting C by mistake, a court might strike "A and B" and thereby include C in the bequest. See MCGOVERNET AL., *supra* note 8, § 6.1, at 236; Roland Gray, *Striking Words Out of a Will*, 26 HARV. L. REV. 212, 230-36 (1913); see also Abigail Van Buren, *Dear Abby: Don't Leave Inheritance to Chance*, S.F. CHRON., Nov. 2, 1989, at E8 (when life imitated art). The opportunity for such creative subtraction depends upon the precise language of each testamentary instrument, hence rendering the correction of scriveners' errors even more capricious.

inanity.<sup>126</sup> For some time, commentators have marked this area of inheritance law as ripe for reform,<sup>127</sup> and the *Restatement (Second) of Property* of 1990 calls for the rectification of drafting errors in wills, be they mistakes of omission or inclusion.<sup>128</sup> The Uniform Probate Code, on the other hand, fails to address the issue.<sup>129</sup>

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<sup>126</sup> Misdescriptions provide the *reductio*: here, the *very same evidence* that shows that the will is wrong demonstrates how it should be righted, yet most courts will admit evidence of error only to strike, not to correct, the error. See *supra* notes 119, 122. Yet, as a matter of arid doctrine, extrinsic words may be added to testamentary instruments despite the Statute of Wills under other circumstances, sometimes (though not exclusively) by resort to equity. See *infra* notes 131, 148–50 and accompanying text. See also *In re Fowles' Will*, 118 N.E. 611, 613 (N.Y. 1918) (Cardozo, J.) (opining that “[s]ome reference to matters extrinsic is inevitable” despite the “apparent generality” of the Statute of Wills; “[i]t is a question of degree”). But see MCGOVERN ET AL., *supra* note 8, § 6.1, at 235 (suggesting that the phrasing of the Statute of Wills supports the mistaken omission/inclusion distinction); Joseph Warren, *Fraud, Undue Influence, and Mistake in Wills*, 41 HARV. L. REV. 309, 333 (1928) (same).

<sup>127</sup> For general criticisms of the law of mistake in wills (not limited to scribes' errors), see deFuria, *supra* note 119; James A. Henderson, Jr., *Mistake and Fraud in Wills* (pts. 1 & 2), 47 B.U. L. REV. 303, 461 (1967); Clark Shores, *Reforming the Doctrine of No Reformation*, 26 GONZ. L. REV. 475 (1990/91); Langbein & Waggoner, *supra* note 123. Cf. Warren, *supra* note 126, at 333–34 (asserting that while the “words of the Wills Acts” supported the traditional distinction between striking mistakenly included words and adding mistakenly omitted words, the “same policy” applied to both cases; but submitting that this policy precludes judicial reformation of wills in *either* instance); see also 9 WIGMORE, *supra* note 119, § 2421, at 71 (characterizing the treatment of mistaken omissions and inclusions as “perhaps inconsistent[]”).

<sup>128</sup> See RESTATEMENT (SECOND) OF PROPERTY, *supra* note 33, § 34.7 & cmt. d & illus. 11; see also RESTATEMENT (THIRD) OF PROPERTY, *supra* note 39, § 11.2(a) & (b)(2) & cmt. n, § 12.1 & cmt. i. Likewise in Great Britain, the Administration of Justice Act of 1982 allows for the correction of clerical errors in wills. Administration of Justice Act, ch. 53, § 20(1)(a) (1982) (Eng.). Only a few American courts thus far have taken this approach. See *supra* note 119.

<sup>129</sup> Neither the original nor the revised Uniform Probate Code (nor its precursor, the Model Probate Code) has addressed the consequences of mistakes of omission or inclusion; nor did any proposed provision on the subject of mistake ever appear in one of the Code's published drafts. See UNIF. PROBATE CODE, *supra* note 5, § 2-601 cmt. (asserting that the Code is not intended to preclude *judicial* adoption of a reformation doctrine for mistaken omissions and inclusions). The failure of the revised Code affirmatively to admit extrinsic evidence to cure a mistaken *substantive* omission could be deemed structurally inconsistent with the Code's dispensing power (discussed *supra* note 33 and accompanying text), which allows extrinsic evidence to cure *procedural* omissions of form in the process of will execution. See *id.* § 2-503. See also *infra* note 227. That the Restators rather than the Commissioners have set the pace in this area is the more intriguing because the two drafting

In some cases, however, a testator's failure to integrate material into an executed writing is quite deliberate. Whether heedlessly or witlessly,<sup>130</sup> the testator may intend to give effect to substantive provisions that she expresses somewhere other than in her will. Can a court implement such spatially external provisions? The answer is *no*, but with exceptions—in other words, *sometimes*.

If a will is accompanied by an unexecuted statement of supplementary instructions, the court can implement those instructions in most jurisdictions if they meet a number of requirements: the statement must be *explicitly referred to* in the will, it must be *in writing*, and it must have been set down *prior to the time when the will was executed*. Such a statement can then be *incorporated by reference* under the law of most states, despite its failure to comply with the formalities dictated by the Statute of Wills.<sup>131</sup>

What is going on here? In this scenario, the testator has again made a mistake of sorts—not a mistake concerning what words were contained within the document she executed, but rather a mistake concerning the law of due execution.<sup>132</sup> She failed (it would appear) to realize that words supplementing

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committees overlapped substantially; the Reporter for the revised Article 2 of the Code, Professor Lawrence Waggoner, also sat as advisor to the Restatement and has long advocated reform of the law of mistake within wills. See Langbein & Waggoner, *supra* note 123; see also Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 603–04 (1995) (suggesting that the philosophies of both law reform organizations are equivalent); *id.* at 618–19 (noting a difference in procedure between the two organizations). Professor Waggoner explains the decision not to include a reformation doctrine in the Code as having followed primarily from the fact that it could not easily and briefly have been crafted into *legislation* and secondarily from concern that the doctrine would have aroused political controversy and hence might have endangered state adoptions of the revised Code as a whole. See Letter from Lawrence W. Waggoner to Adam J. Hirsch (January 21, 1996) (on file with author).

<sup>130</sup> Possibly the testator seeks after privacy without sacrificing legal enforceability, or possibly she simply will not be bothered to repeat information already set down or uttered apart from the will, or possibly she has not yet completed her planning and will not be bothered to delay execution of the will until her estate plan is complete, or to execute a codicil thereafter.

<sup>131</sup> The rule has been applied with some variations among the states. For doctrinal analysis, see ATKINSON, *supra* note 30, § 80; MCGOVERN ET AL., *supra* note 8, § 6.3, at 249–52; 2 PAGE, *supra* note 11, §§ 19.17–33. Under the common law, it was not enough that the referenced document already existed when the will was executed; the will had expressly to refer to the document as *being* in existence. The Uniform Probate Code does away with this requirement. See UNIF. PROBATE CODE, *supra* note 5, § 2-510 & cmt.

<sup>132</sup> “Incorporation by reference thus touches the lawyer’s activities as a morbid anatomist of wills rather than as a draftsman . . .” Armistead M. Dobie, *Testamentary Incorporation by Reference*, 3 VA. L. REV. 583, 584 (1916).

an executed estate plan had also to be formalized under the Statute of Wills. Lawmakers must now decide whether to give effect to her intent notwithstanding her misconception. And so we face the question: Under what circumstances, if any, are the policies underlying due execution satisfied despite the testator's failure even to attempt to comply with the statutory requirements?<sup>133</sup>

By promulgating the doctrine of incorporation by reference, courts have announced their answer. A writing helps to certify the quality of the evidence of what was intended. And the requirement that the writing antedate the will, and that the will refer to it expressly, also certifies its finality;<sup>134</sup> were the writing left unreferenced, or were it referenced prospectively, courts could not easily determine whether the extrinsic document constituted a tentative or final draft of what the testator intended legally to incorporate.<sup>135</sup>

So, we can report with some assurance that, hedged in as it is, the doctrine of incorporation by reference runs afoul of neither of the principal policies underlying the Statute of Wills.<sup>136</sup> Still, we may fairly ask whether the law

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<sup>133</sup> Cf. the Uniform Probate Code's dispensing power, addressed *supra* note 33.

<sup>134</sup> Again from an evidentiary standpoint, the reference requirement provides evidence of which document was intended to be incorporated when more than one candidate is offered for probate. Hence, the document must be referred to with sufficient specificity to permit its identification. The reference requirement also reduces the vulnerability of the estate plan to fraud, in that a would-be defrauder could not forge an appropriate document unless the executed will happened to contain such a reference, and unless she had knowledge of the details of the reference in the will. Thus, the reference requirement substitutes for the fact that the document referred to need not be signed by the testator (nor stored in a secure location).

<sup>135</sup> Cf. UNIF. PROBATE CODE, *supra* note 5, § 2-511(a) (allowing a testator to bequeath property to the trustee of a trust "executed before, concurrently with, or after the execution of the testator's will") (emphasis added). This provision forms an exception to the antecedent document requirement of incorporation by reference. Nonetheless, the exception is thematic in that the execution of a trust is itself a formal act, in contradistinction to the preparation of an informal writing.

<sup>136</sup> See *In re Rausch's Will*, 179 N.E. 755, 756-77 (N.Y. 1932) (Cardozo, C.J.) (discussing the doctrine). Nonetheless, courts have treated material incorporated by reference into a will as *apart from the will*, but brought into effect by it, as opposed to material integrated into a will, *comprising the effective instrument itself*. "The papers incorporated by reference are used to construe and apply the will, and do not become part of the will in the same sense as those integrated." *In re Estate of Nielson*, 105 Cal. App. 3d 796, 803 (1980) (citations omitted). This distinction is, to say the least, deeply metaphysical. Ordinarily it makes no difference, because material outside a will that is incorporated and material inside that is integrated are equally valid. But in one instance it does: under holographic will doctrine, all material provisions of a will must be in the testator's handwriting. That means no substantive provisions of the estate plan can be integrated into



could tolerate without undue cost still greater testamentary laxity—or, more precisely for present purposes, whether the law in other respects *already* relaxes the formal specifications for effective testation in ways that are out of step with the strictures imposed by the doctrine of incorporation by reference.

Consider again the limitation of extrinsic materials to *prior* referenced writings. If the testator refers in her will to a document not yet prepared, but which turns out to exist by her death, we can assert with fair confidence that the substantive information indelibly preserved in its lettering reflects what the testator had in mind; what is less clear is whether that mind was *made up*, whether the testator intended this document to be the polished, legally effective one. Notice that the problem here differs from that of mistaken omissions—it is, in fact, its structural mirror image. In the case of mistaken omissions, we had strong evidence of the testator's intent to render extrinsic provisions effective, but weaker evidence concerning what those provisions were; here, the case is precisely the reverse. But we touched earlier on another problem offering a tighter structural analogy to that of incorporating subsequent documents by reference—namely, the problem of holographic wills. Like referenced documents, handwritten wills also provide sound, if not sounder, evidence of their substance.<sup>137</sup> But the testator's resolution to put them into legal operation is no less problematic in the one case than in the other. In those states that admit into probate holographic wills in lieu of a properly executed writing, courts must conduct an inquiry along these lines. Admission into probate of subsequent referenced writings seemingly would entail the same sort of inquiry, yet these are everywhere barred, even in states that do validate holographs.<sup>138</sup>

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the document by type-writing. Still, because a document incorporated by reference is deemed to be located "outside" of the will (although thereafter drawn inside), many though not all courts have permitted holographic wills effectively to incorporate type-written provisions. See 2 PAGE, *supra* note 11, § 20.5, at 286–87. Criticizing this inconsistency, see Bird, *supra* note 47, at 624–28; Philip Mechem, *The Integration of Holographic Wills*, 12 N.C. L. REV. 213 (1934). But see Thomas H. Malone, *Incorporation, by Reference, of an Extrinsic Document into a Holographic Will*, 16 VA. L. REV. 571 (1930) (defending the disparity). Even the technical distinction between integration and incorporation in this context can be fuzzy. See Jodi M. Graves, Note, *Incorporation by Reference, Integration, and Holographic Wills in Gifford v. Estate of Gifford*, 46 ARK. L. REV. 1013 (1994). But see Evans, *supra* note 82, at 888–91 (asserting the distinctness of the distinction).

<sup>137</sup> Both handwritten documents and referenced documents also provide a measure of protection against fraud. See *supra* note 134.

<sup>138</sup> The doctrine of incorporation by reference and proof of holographic wills have nowhere been compared. But at least one court has endorsed (implicitly) the principle of allowing testators to incorporate by reference writings prepared after a will is executed, by giving effect to such a writing by resort to legal fiction where the evidence demonstrated

The Uniform Probate Code, which endorses holographs, nonetheless limits incorporation by reference in general to preexisting writings, as tradition, if not structural consistency, would dictate.<sup>139</sup> But the drafters created an exception with respect to the disposition of tangible personalty, which *can* be made by reference to subsequent writings under the Code.<sup>140</sup> This provision suggests some recognition on the part of the drafters that the traditional limitation is anomalous, or at least unnecessary,<sup>141</sup> though their decision to abrogate the limitation only in this one respect has no clear basis in policy—and so, by half-disposing of one anomaly, the drafters ushered in another.<sup>142</sup>

Consider also the writing requirement. By universal consensus, a will can incorporate by reference only lettering, not speech. Is such a limitation justified? References in a will to prior communications, whether set down on paper or merely uttered, would appear equally to manifest the testator's resolve to infuse them with performative power. However informally or even equivocally expressed at the time, those communications have now been recalled in an executed document. What remains more doubtful is our ability accurately to reconstruct the substance of a statement that was issued not in ink, but through the evanescent medium of sound. Here the case *is* structurally analogous to that of mistaken omissions and inclusions, where we again have strong evidence of the testator's intent to include in a will extrinsic material,

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convincingly that the writing was intended to be legally effective and was untainted by fraud (having been stored in a vault). *See* *Simon v. Grayson*, 102 P.2d 1081 (Cal. 1940).

<sup>139</sup> The Uniform Probate Code posits both traditional rules without evidentiary comparison. *See* UNIF. PROBATE CODE, *supra* note 5, § 2-502(b) & cmt., § 2-510 & cmt. The Model Probate Code failed to address at all the problem of incorporation by reference.

<sup>140</sup> The two additional requirements are that such writings be signed by the testator and that they not contradict specific bequests within the will. *See id.* § 2-513. This provision also appeared with minor modifications in the original version of the Code. *See id.* app. VII, § 2-513 (pre-1990 art. 2).

<sup>141</sup> The drafters justified the provision as "part of the broader policy of effectuating a testator's intent and of relaxing formalities of execution." *Id.* § 2-513 cmt.

<sup>142</sup> The provision appears to have been premised on the assumption that tangible personalty is typically of small value; one draft version of this section of the Code limited to \$500 the value of the personalty disposed of in a subsequent referenced writing if the items were used in a trade or business. *See* UNIF. PROBATE CODE § 2-512 (Fourth Working Draft, Second Tentative Draft, July 22-Aug. 1, 1968). No formal limitation on value found its way into the final version of § 2-513, however, and in some instances the personalty thus bequeathed has held substantial value. *See* MCGOVERN ET AL., *supra* note 8, § 6.3, at 251 & n.16; *see also* *Clark v. Greenhalge*, 582 N.E.2d 949 (Mass. 1991); JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 293 n.27 (5th ed. 1995) (further elaborating *Clark v. Greenhalge*, where a \$35,000 painting was at issue, but where § 2-513 was not explicitly in force). *See generally* A.L. Moses, *Mountains, Molehills and Separate Memos Under the UPC*, 3 PROB. & PROP., Sept.-Oct. 1989, at 35.

but weaker evidence concerning the precise terms that were left out. One finds no reason to treat the two cases differently,<sup>143</sup> and their respective doctrines arguably ought to correspond—though as the law now stands not even the doctrines applicable to mistaken omissions and inclusions correspond.<sup>144</sup> Whereas the latter asymmetry is too obvious to miss,<sup>145</sup> neither courts nor commentators have ever compared the problems of proof of mistake and incorporation by reference.<sup>146</sup>

When a will purports to incorporate *subsequent* oral communication, we face dual evidentiary obstacles. We can be confident neither that the testator meant her words to be final nor even that they have been reported accurately. Lawmakers have rejected such an inquiry with respect to nuncupative wills, which likewise offer no assurances either of finality or accuracy, apparently in the interest of judicial certitude as well as efficiency.<sup>147</sup> If we bar one, then arguably we should bar the other—as in fact we do, though not, once again, by virtue of explicit structural comparisons.

Yet there remains still another doctrine that can play upon cases of intentional omissions from wills, with results so incongruous as to verge on the bizarre. If a testator bequeaths outright to a legatee and also asks for and secures from that legatee, either affirmatively or by virtue of her silence,<sup>148</sup> a promise to hold the property for *other* beneficiaries (a so-called “secret trust” because this intention is not evidenced by the will), equity steps in to enforce

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<sup>143</sup> The cases do differ in that in one instance the testator omitted material from an executed document intentionally and in the other not. But that difference is immaterial from the standpoint of intent effectuation. In that light, the relevant question is whether courts can determine intent with reasonable confidence, and with respect to the *evidentiary* task at hand the two scenarios appear to correspond quite closely.

<sup>144</sup> See *supra* notes 119–22 and accompanying text.

<sup>145</sup> See *supra* notes 127–28 and accompanying text.

<sup>146</sup> Notice also the unexplained inconsistency within the Uniform Probate Code between the invalidity of parol *provisions* referred to in a will (under the doctrine of incorporation by reference) and the enforceability of parol *agreements* referred to in a will (under the doctrine of contracts to make wills). See *supra* note 76.

<sup>147</sup> See the brief discussion in MCGOVERN ET AL., *supra* note 8, § 4.5, at 177–78.

<sup>148</sup> In this context, “mere silence is ordinarily a sufficient indication of . . . agreement.” All that is required is that the legatee “does not refuse to hold the property upon the [terms] intended.” RESTATEMENT (SECOND) OF TRUSTS, § 55 cmt. d & illus. 3 (1959); RESTATEMENT OF RESTITUTION, *supra* note 63, § 186 cmt. c & illus. 3. Such would not be the rule under the standard principles of contract law, however, where silence implies agreement only under very restrictive circumstances. See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 61, § 69; Michael Ansaldi, *The Do-Nothing Offeree: Some Comparative Reflections*, 1 J. TRANSNAT’L L. & POL’Y 43 (1992).

the promise.<sup>149</sup> Here extrinsic evidence is admissible to prove the terms of the testator's communication with the legatee, irrespective of whether that communication occurred before or after the will was executed, and irrespective of whether it was delivered orally or in writing.<sup>150</sup>

Courts have traditionally justified this result as necessary to avoid unjust enrichment: But for the legatee's promise to carry out her wishes, the testator would have altered her will to benefit the true object of her bounty.<sup>151</sup> The doctrine, in fact, bears a close resemblance to promissory estoppel with detrimental reliance, where the promisee, in this case the testator, suffers the detriment (as it were) posthumously.

Yet what is truly at stake here? In cases of inheritance induced by fraud, we invoke the doctrine of unjust enrichment to prevent the beneficiary from profiting from her tortious act of deceiving the testator, conduct which the legal system strives to deter.<sup>152</sup> Though promissory estoppel has also often been likened to an action *ex delicto*,<sup>153</sup> this characterization is inapt. The act of casual promise-making is benign so long as no overt deception is involved, for it reflects simply a state of mind—which, as everyone knows, is protean by

<sup>149</sup> See generally RESTATEMENT OF RESTITUTION, *supra* note 63, § 186; RESTATEMENT (SECOND) OF TRUSTS, *supra* note 148, § 55. The remedy applied here is an equitable constructive trust: The named legatee inherits as the will mandates but is deemed a constructive trustee for the benefit of the intended beneficiary. The substantive result is that the intended beneficiary takes precisely as if the will incorporated the provision that was left out of the executed document and so, it seems fair to say, this equitable process is mere judicial clothing for an otherwise naked incorporation into a will of provisions expressed beyond it. "But call it what you will, and argue as you may, a parol trust ingrafted upon a written bequest by parol testimony, by a decree of a court, after the death of a testator, is pro tanto the establishment of a parol will for the testator." *Moore v. Campbell*, 14 So. 780, 782 (Ala. 1894) (Coleman, J.).

<sup>150</sup> See RESTATEMENT OF RESTITUTION, *supra* note 63, § 186 cmt. c & d & illus. 1 & 4; RESTATEMENT (SECOND) OF TRUSTS, *supra* note 148, § 55 cmt. c & d & illus. 1 & 2.

<sup>151</sup> *E.g.*, RESTATEMENT OF RESTITUTION, *supra* note 63, § 186 cmt. b; RESTATEMENT (SECOND) OF TRUSTS, *supra* note 148, § 55 cmt. a.

<sup>152</sup> *E.g.*, ATKINSON, *supra* note 30, § 56, at 264. Deceit harms persons, in economic terms, by increasing information costs. See POSNER, *supra* note 32, § 4.6.

<sup>153</sup> What is the justification for [promissory estoppel]? The possibility of an answer founded on principles of tort law is inescapable . . . One person has caused harm to another by making and then breaking a promise in circumstances that the promisor should reasonably have expected would cause such harm, and the promisor is therefore held liable for the harm caused.

1 E. ALLAN FARNSWORTH, ON CONTRACTS § 2.19, at 146-47 (2d ed. 1990 & Supp. 1995); see also, *e.g.*, Warren A. Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 926-28 (1951).

nature and which, at any rate, promisees have no *legal* right to rely on.<sup>154</sup> The harm in a promissory estoppel case—and, by the same token, in a secret trust case—flows not from wrongdoing, but rather from error,<sup>155</sup> to wit, the promisee's error in assuming that the promise was enforceable<sup>156</sup> and her error in acting on that assumption.<sup>157</sup>

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<sup>154</sup> As a general rule, of course, donative promises are unenforceable. This rule has been said to follow from extra-legal expectations: "The most uneducated layman today understands that if he makes a bargain he is binding himself in a way in which he does not conceive that he is binding himself if he gratuitously promises to do the same thing." Hamson, *supra* note 68, at 242. Alternatively, for a recognition of the circularity of the conventional reliance rationale, see Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 YALE L.J. 1249, 1254 (1996).

<sup>155</sup> Some courts have seen fit to limit the doctrine of promissory estoppel to cases savoring of fraud, however. "These attitudes may simply reflect the belief that, absent conduct approaching willful concealment or misrepresentation, reliance upon an oral, unenforceable promise cannot be justified." Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 382 (1969); *see id.* at 380–82; *see also* Michael B. Metzger & Michael J. Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472, 542 (1983). But most courts have not so restricted the doctrine, and certainly the secret trust doctrine is in no wise limited to instances of fraud—for it is routinely invoked even in cases where the promise is imputed from the legatee's silence. *See supra* note 148. Though some early courts described the legatee's conduct in the secret trust scenario as "fraudulent," they do not appear to have meant the term in the conventional sense and, at any rate, more recent decisions in general have eschewed this characterization. *See* 4 PALMER, *supra* note 119, § 20.6, at 208–09.

<sup>156</sup> Alternatively conceptualized within a tort framework, one might say that, however negligent the idle promise on the part of the promisor, there has been contributory negligence on the part of the promisee in failing to know (or learn) the law of donative promises.

<sup>157</sup> Were the promisee not mistaken about the state of the law, she could not invoke the doctrine of promissory estoppel. *See* Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1306 n.107 (1980). Likewise, were the testator-promisee aware that her request that a legatee apply the bequest for the benefit of others was not enforceable, it would be deemed a precatory instruction rather than a secret trust. *See* RESTATEMENT (SECOND) OF TRUSTS, *supra* note 148, § 55 cmt. g (denying effect to requests to a legatee where the testator "does not intend to impose any legal obligation upon him"). Nonetheless, promissory estoppel and secret trusts have not traditionally been conceptualized in precisely these terms. Williston came closest in the course of discussing the antecedent doctrine of equitable estoppel:

The doctrine of equitable estoppel exists to prevent fraud or injustice; to the extent that a person has made a statement . . . it is unjust and tantamount to fraud to permit him thereafter to allege and prove facts contrary to his previous statements. In its pure

In essence, secret trust cases are mistake cases. Here, the testator has relied on the mistaken assumption that the promise made to her by the legatee was effectively included within her estate plan. The situation is of a piece with other instances where the testator fails properly to formalize her intent because she believes she has taken all of the steps necessary to do so. Whether the testator relies on a legatee's promise or simply on an extrinsic statement or document identified in her will to supplement her estate plan, she has made a mistake that induces her to leave the will unamended; in both instances, the law's failure to correct the mistake would result in enrichment, no more and no less just, of the taker under the executed writing alternative to the intended one. Yet against this "error cost" to the testator must be weighed the advantages gained by fortifying the four walls of the will against verbal encroachments from without. As we have seen, those advantages involve the confidence with which we can posit (1) as a matter of ritual, that the testator intended to set in motion an estate plan, and (2) as a matter of evidence, that the testator had a particular plan in mind.<sup>158</sup> In both respects, the admission of extrinsic words is fraught with peril and hence could again give rise to error—now by the court, in endeavoring to rectify that of the testator.

The doctrine of incorporation by reference resolves this dilemma by deeming effective only those extrinsic provisions that are in writing, antedate the will, and are identified within it. *The secret trust doctrine waives all of these requirements.* So long as the testator informed the legatee of her intent, courts give effect to her ostensible estate plan in equity, even if unreferenced, even if formulated after the will was executed, and even if communicated by word of mouth.

Compare the alternatives:

*Scenario # 1:* Testator's will bequeaths the whole of her estate to A. The

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common-law form, this formulation of equitable estoppel necessarily precludes reliance on representations of present or future intention, since representations of intention are by their nature uncertain and likely to change, and therefore . . . the party to whom the representation was made would have no right to rely upon it and could not reasonably do so. However, it is clear that in many instances one to whom the representation . . . is made will rely upon it, so that an injustice might well occur in that instance as well. It is precisely for this reason that the law of promissory estoppel developed.

4 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 8:3, at 35-38 (Richard A. Lord ed., 4th ed. 1992) (citations omitted); see also Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 635 (1982) (associating promissory estoppel with paternalism in order to protect "an innocent party too dumb to realize he hadn't done what he needed to do to get a binding obligation").

<sup>158</sup> Not to mention the administrative costs of establishing both.

will also refers to a letter to be prepared later and turned in to her attorney, B, that will dispose of \$10,000 out of the estate to takers named therein. Such a letter is in fact tendered to B. Result: the letter is ineffective. A will cannot incorporate by reference a subsequent writing.

*Scenario # 2:* Testator's will bequeaths the whole of her estate to A. Subsequently, the testator tenders to A a letter informing A that \$10,000 of the sum bequeathed to A should be handed on to takers named therein. A does not refuse to comply.<sup>159</sup> Result: the letter is effective in equity as a secret trust. A secret trust *can* postdate the will it modifies.

So, when we press the doctrine of incorporation by reference up against the secret trust, we find that the outcome can hinge on whom the subsequent communication was directed toward. If a legatee, one outcome follows; otherwise, another.<sup>160</sup> Yet there would seem not the slightest ritualistic or evidentiary difference between the two.<sup>161</sup> Nor is there any substantively greater injustice in one case than in the other. In Scenario # 1, the testator was mistaken about the legal effectiveness of a subsequent letter. The law's failure to correct the mistake would enrich A. In Scenario # 2, the testator was mistaken about the legal effectiveness of A's (imputed) promise. The law's failure to correct the mistake would again enrich A. To discover "unjust enrichment" in the second case and not in the first is to draw a distinction, shall

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<sup>159</sup> Recall that silent nonrefusal qualifies as an affirmative promise in secret trust cases. See *supra* note 148.

<sup>160</sup> The requirement of communication with the legatee in order to create a secret trust is strictly enforced. See RESTATEMENT OF RESTITUTION, *supra* note 63, § 186 cmt. f; RESTATEMENT (SECOND) OF TRUSTS, *supra* note 148, § 55 cmt. f; 1A SCOTT, *supra* note 85, § 55.5.

<sup>161</sup> Several commentators have criticized secret trust doctrine, though without directly comparing it to the doctrine of incorporation by reference. See MCGOVERN ET AL., *supra* note 8, § 6.2, at 247 (characterizing secret trust doctrine as "odd"); Ralph W. Gifford, *Will or No Will? The Effect of Fraud and Undue Influence on Testamentary Instruments*, 20 COLUM. L. REV. 862, 872-74 (1920) (characterizing secret trust doctrine as "unsound"); Frank L. Simpson, *Constructive Trusts and the Statutes of Frauds and Wills*, 11 B.U. L. REV. 22, 30 (1931). For the one explicitly comparative analysis, see T.L. Tolan, Jr., Comment, *Wills—Incorporation by Reference—Comparison with Secret Trusts and Acts of Independent Significance*, 46 MICH. L. REV. 77 (1947) (see especially 84-85). Conceivably, one might argue (though no one has) that the testator's action of communicating with the legatee denotes greater finality of intent than when she communicates with others, or, in perhaps a more significant comparison, than when she simply prepares a memorandum of instructions and fails to communicate it to anyone. But the difficulty is that the act of communicating is not inherently ritualistic—if it were, then we could give nuncupative wills (which, by definition, must be broadcast) greater credence than holographs!

we say, exceedingly nice and refined. But, once again, courts (and Commissioners<sup>162</sup>) *have failed to draw any connection at all between the two doctrines.*<sup>163</sup>

And that is not all. Consider:

*Scenario # 3:* Testator's will bequeaths the whole of her estate to A. The will also refers to a letter to be prepared subsequently that will require A to hand \$10,000 of the sum bequeathed to A to takers named therein. In due course, the testator tenders such a letter to A, who does not refuse to comply. What result? *A fortiori*, one would suppose, courts will correct the mistake. Here our evidence that the testator intended the extrinsic document to be legally binding is marginally better, because she did at least refer to it explicitly in her will. By comparison, the doctrine of incorporation by reference *requires* that all documents offered for incorporation be identified in an executed writing. Yet under the doctrine of secret trusts the testator's addition of a reference to the document has the *opposite* effect of rendering it invalid! This remarkably incongruent result follows not from a comparative view of the cases (needless to say), nor even from a narrower policy analysis of the evidentiary problem at hand, but simply from the reified traditions, and traditional boundaries, of equitable relief. In the instant scenario, the call to prevent unjust enrichment ceases, ostensibly, because a finding that the extrinsic document was mistakenly ineffective does *not* leave A with the \$10,000. Rather, the bequest

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<sup>162</sup> Though the Uniform Probate Code addresses the problem of incorporation by reference, see UNIF. PROBATE CODE, *supra* note 5, § 2-510, it fails to cover secret trusts. This failure must be accounted a flaw in the Code, for both doctrines are aimed in substance at the same structural problem—namely, establishing the metes and bounds of the estate plan. That secret trusts have not, by tradition, been categorized as an aspect of *probate* law, but rather have been dealt with under *trust* law, stems apparently from the different remedies (incorporation versus equitable constructive trust) applied in the two cases. This difference is entirely artificial and has had the unfortunate consequence of masking the structural proximity of the two doctrines—perverse camouflage that succeeded in distracting the drafters of the Uniform Probate Code. (Yet those drafters did not shrink from extending their codifications into the traditional category of trust law in some other respects. *See e.g., id.* § 2-707 (b).)

<sup>163</sup> The connection does not appear to have been made in any published cases. For the sole academic discussion, see Tolan, *supra* note 161. Tolan speculated that the inconsistency traces to “the psychological effect of terms such as ‘unjust enrichment’ . . . or in the gradual extension of the trust remedy into fields of unintentional fraud without a sidelong glance toward the supposedly rigid and encrusted doctrines already occupying the area.” *Id.* at 90. Compare Professor Evans, who referred to the two problems comparatively as “perhaps similar,” but then proceeded to deny the aptness of the analogy, on the technical basis that secret trusts violate the Statute of Wills, whereas incorporation by reference (ostensibly) does not. *See Evans, supra* note 83, at 652–53.



of \$10,000 to A for the stated benefit of unnamed others fails for want of beneficiaries and goes instead under this scenario to the testator's heirs-at-law—who, casuistry tells us, are thereby enriched with perfect justice.<sup>164</sup> *Non sequitur*.<sup>165</sup>

By now the reader may be forgiven for wishing to avert her eyes, but we have still one more embarrassing scenario to look at. This one is suggested by the rule permitting testators to create secret trusts via subsequent *oral* communication with a beneficiary.<sup>166</sup> Recall that if a testator were to identify in her will a sum to be disposed of in accordance with a subsequent oral declaration of hers, the bequest would fail under the doctrine of incorporation by reference. Both the evidence and finality of the declaration would, in combination, be too difficult to confirm. It is this policy that long ago prompted the abolition of nuncupative wills and that, by the same token, bars nuncupative codicils to executed wills.

Never mind all that. Consider:

*Scenario # 4:* Testator executes a will bequeathing her entire estate to A. Subsequently, from time to time, she gives A *oral* instructions concerning who is to get what out of her estate. A does not refuse to comply. The instructions are enforceable as a secret trust. Thus can the testator effect changes in her estate plan as the spirit moves her, merely by blurting them out. In this connection, the formal requisites of the Statute of Wills fail to apply.<sup>167</sup>

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<sup>164</sup> See 1A SCOTT, *supra* note 85, § 55.8. The *locus classicus* of this result is an old chestnut, *Olliffe v. Wells*, 130 Mass. 221 (1881). English courts have not followed this rule, but rather treat “semi-secret trusts” (as instructions to legatees referred to, but not set down, in wills are known) no differently from secret trusts, an approach also followed in a small minority of American jurisdictions. See 1A SCOTT, *supra* note 85, § 55.8, at 82–84.

<sup>165</sup> The point has been recognized, though again without comparison to incorporation by reference. See RESTATEMENT (SECOND) OF TRUSTS, *supra* note 148, § 55 cmt. h; MCGOVERNET AL., *supra* note 8, § 6.2, at 249; 4 PALMER, *supra* note 119, § 20.7, at 231; 1A SCOTT, *supra* note 85, § 55.8, at 86–87; Langbein & Waggoner, *supra* note 123, at 576 n.210; Julius B. Levine & Randall L. Holton, *Enforcement of Secret and Semi-Secret Trusts*, 5 PROB. L.J. 7, 7, 16 (1983).

<sup>166</sup> See *supra* note 150.

<sup>167</sup> This assumes, however, that someone was in earshot to testify as to what the testator told A, and that the testator was unaware that as a matter of law binding testamentary instructions must be executed. See *supra* note 157. A similar aberration arises out of the Uniform Testamentary Additions to Trusts Act, grafted onto the Uniform Probate Code. By this Act, a testator can bequeath her entire estate to an empty inter vivos trust and then revise the substantive terms of that trust by repeated oral declarations. These oral declarations can be effective to alter the terms of the trust into which the probate estate will pour-over. The revised version of the Uniform Probate Code leaves standing this result. See UNIF. PROBATE CODE, *supra* note 5, § 2-511 & cmt.; DUKEMINIER & JOHANSON, *supra* note

We have completed our foray into the legal process of making a will. Along the way, we have encountered a maze of inconsistency that has demanded patience and, on occasion, suspension of disbelief. But we cannot yet have done with it all. Determining what comprises a justiciable estate plan is only the half of it.

### III. TESTAMENTARY HERMENEUTICS

#### A. Theoretical Prologue

We turn now from form to substance—that is, to the substantive provisions of the estate plan itself. Having found that a testator expressed herself in a legally proper manner, how does a court go about deciphering the information so recorded? It is the age-old problem of hermeneutics, first addressed by the Roman jurists who faced Latin as opposed to English texts, but texts all the same.<sup>168</sup>

In the testamentary setting, the process of textual interpretation—like that of textual authentication—is complicated by the fact that the author of the document needing to be clarified can no longer testify as to what the document means, or was meant to mean.<sup>169</sup> But the guiding principle here is plain enough. As judges never tire of reiterating,<sup>170</sup> the object of the exercise is to glean *the intent of the testator*.<sup>171</sup> That is “the pole-star by which the courts must steer.”<sup>172</sup> Whether intent-effectuation is the *only* policy courts ever follow

142, at 366–67 & n.11 & problem 2.

<sup>168</sup> See generally A. Arthur Schiller, *Roman Interpretatio and Anglo-American Interpretation and Construction*, 27 VA. L. REV. 733 (1941).

<sup>169</sup> At least when courts misconstrue legislative intent, the legislature can correct them. See, e.g., Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 263–66 (1992). When it comes to testamentary instruments, however, “the difficulties that arise in discerning the true meaning of the testator, or sometimes in discovering any meaning at all” have long been notorious. 1 BLACKSTONE, *supra* note 26, at \*7–8; see also, e.g., *Roberts v. Roberts*, 80 Eng. Rep. 1002, 1008 (K.B. 1613) (Coke, C.J.). Once again, ante-mortem probate would alleviate some (though not all, see *infra* Part III.C.) of the problems of testamentary hermeneutics, assuming that construction proceedings were held as a routine part of that process. See also *supra* note 12.

<sup>170</sup> “Traditionally, and perhaps rather monotonously, courts have repeated, as we do here again . . .” *Engle v. Siegel*, 377 A.2d 892, 893 (N.J. 1977).

<sup>171</sup> E.g., *In re Estate of Herz*, 651 N.E.2d 1251, 1253 (N.Y. 1995). For an Everest of citations, see 4 PAGE, *supra* note 11, § 30.6.

<sup>172</sup> The phrase traces to Chancellor Kent early in the nineteenth century. 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 521 (photo. reprint 1971) (1826–30). See, e.g.,

as they navigate testamentary texts is another question. Perhaps the judges doth protest too much, for at times they do seem to have an eye on a constellation of other concerns,<sup>173</sup> however obscured by the cant of intent. As a general proposition, however, intent is key to the construction of wills. Indeed, to hold otherwise could be said to amount to a contradiction in terms: for what else could we mean by construing a text other than determining what it seeks to articulate?

## B. Word Ambiguities

Yet determining the substantive import of an estate plan is often a difficult matter. The principal source of that difficulty appears readily: Wills are couched in language, and one need not be versed in Wittgensteinian philosophy to recognize that language by its nature is prone to ambiguity.<sup>174</sup> Just because a

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Biles v. Martin, 259 So. 2d 258, 262 (Ala. 1972); Smith v. Weitzel, 338 S.W.2d 628, 635 (Tenn. Ct. App. 1960). In medieval times, only the metaphor was different:

It is written, that the will or meaning of the testator is the Queene or Empresse of the testament. Because the *will* dooth rule and governe the testament . . . and in every respect moderate and direct the same . . . [T]herefore [the] meaning of the testator, ought before all thinges to bee sought for . . . as earnestly as the hunter seekth his game.

SWINBURNE, *supra* note 25, at 9a. For still other metaphors, see 4 PAGE, *supra* note 11, § 30.6, at 32–33 n.1. *Sans* metaphor, the Commissioners and Restaters have both adopted this credo. See UNIF. PROBATE CODE, *supra* note 5, § 1-102(b)(2); RESTATEMENT (THIRD) OF PROPERTY, *supra* note 39, § 10.1 cmt. c. On courts' success in this enterprise, see generally William M. McGovern, *Facts and Rules in the Construction of Wills*, 26 UCLA L. REV. 285 (1978).

<sup>173</sup> Administrative convenience and protection of the family are the principal ones.

<sup>174</sup> For a recent revisionist look at Wittgenstein's linguistics and its application to legal theory, see Christian Zapf & Eben Moglen, *Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein*, 84 GEO. L.J. 485 (1996). Long before Wittgenstein took up the subject, John Locke observed that "the very nature of Words, makes it almost unavoidable, for many of them to be doubtful and uncertain in their significations." Locke went so far as question whether "Language, as it has been employ'd, has contributed more to the improvement or hinderance of Knowledge amongst Mankind." JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. III, ch. IX, § 1 & ch. XI, § 4 (P.H. Nidditch ed., Clarendon Press 1975) (1690).

Sometimes ambiguity is even deliberate, serving the purposes of the speaker (for example, in the context of poetic or political discourse)—a phenomenon known in theoretical linguistics as *equivocation*. For discussions, see JANET BEAVIN BAVELAS ET AL., EQUIVOCAL COMMUNICATION (1990); ISRAEL SCHEFFLER, BEYOND THE LETTER 17–20

testator expresses herself with words—even written words—does not ensure that she will express herself clearly. Alas, “[i]t is easy to say nothing with words.”<sup>175</sup>

Ambiguity can creep into wills in a variety of ways. One source of ambiguity is the fact that different persons may use the same word to mean different things. To speak of a “language” is in truth to generalize, for every language is an amalgam of dialects—a point remarked by George Bernard Shaw in his famous quip that Americans and Britons are “divided by a common language.”<sup>176</sup> But even to speak of a dialect is itself a generalization, for each of us in truth has her own dialect—what is known in theoretical linguistics as an *idiolect*. What you or I mean by a particular word could differ from what a testator meant by that very same word.<sup>177</sup> Hence arises the

(1979). For an illustration of the potential political expediency of equivocation, see Thomas Powers, *The Spook of Spooks*, N.Y. REV. BOOKS, Dec. 1, 1994, at 8, 10. It seems doubtful, however, that many testators inject ambiguity into their wills for strategic purposes.

<sup>175</sup> Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 559 (1967).

<sup>176</sup> Though attributed to Shaw, this clever bit of trope could not be found among his surviving papers and may be apocryphal. See THE OXFORD DICTIONARY OF QUOTATIONS 638 (Angela Partington ed., 4th ed. 1992). Whether Shaw’s or no, the point is elaborated in exquisite detail in H.L. MENCKEN, THE AMERICAN LANGUAGE (4th ed. 1936). Distinctions between linguistic usage on opposite sides of the Atlantic continue to intrigue linguists (e.g., *Playing with Words*, THE ECONOMIST, July 30, 1994, at 78) and have also been acknowledged by lawmakers. See 3 RESTATEMENT OF PROPERTY § 242 cmt. g (1940).

<sup>177</sup> John Locke recognized the point over three centuries ago:

Words . . . often fail to excite in others (even that use the same Language) the same Ideas, we take them to be the Signs of: And every Man has so inviolable a Liberty, to make Words stand for what Ideas he pleases, that no one hath the Power to make others have the same Ideas in their Minds, that he has, when they use the same Words, that he does.

LOCKE, *supra* note 174, bk. III, ch. II, § 8 (emphasis omitted); see also Letter from John Locke to Bishop of Worcester, *quoted in* 9 WIGMORE, *supra* note 119, § 2462, at 192. Hobbes took a similar (though not quite so bold) view, asserting that sensory words, “[t]he names of such things as affect us,” were of “inconstant signification,” and that in general persons might use any words in a manner different from their accepted meaning, which he termed “Metaphors . . . of speech.” THOMAS HOBBS, LEVIATHAN, 109–10 (C.B. Macpherson ed., Penguin Books 1968) (1651) (emphasis omitted). See also *id.* at 102, 322. The point was also well understood by Lewis Carroll, needless to say. See LEWIS CARROLL, THROUGH THE LOOKING-GLASS 29, 93–94 (Random House 1946) (1872). Recognizing the phenomenon in political discourse, see ABRAHAM LINCOLN, ADDRESS AT A SANITARY FAIR IN BALTIMORE (Apr. 18, 1864), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 748–

question: to what extent can courts explore the personal, individual usage of a word once it is lodged in a testamentary instrument?

The general answer is that they cannot. Under the so-called plain meaning rule—which I prefer to call the meaningless plain meaning rule<sup>178</sup>—most courts have refused to explore subjective sense in the course of construing the text of a will. They have rather construed text by recourse to dictionary definitions—as though every word in our language were a term of art.<sup>179</sup> That way lies a theoretical travesty, it cannot be too strongly said, for the intent of the testator is secreted in her own purport of the words she chose. Words simply *have* no

49 (Roy P. Basler ed., 1946). For modern discussions, see R.H. ROBINS, *GENERAL LINGUISTICS* 48–60 (4th ed. 1989) (noting that idiolects have a situational component, varying with the speaker's role in a given social setting); Alexander George, *Whose Language Is It Anyway? Some Notes on Idiolects*, 40 *PHIL. Q.* 275 (1990) (noting that idiolects also have a dynamic component, fluctuating over time).

<sup>178</sup> For an early formulation of the rule, see JAMES WIGRAM, *AN EXAMINATION OF THE RULES OF LAW RESPECTING THE ADMISSION OF EXTRINSIC EVIDENCE IN AID OF THE INTERPRETATION OF WILLS* 18 (5th ed., Sweet & Maxwell 1914) (1831). Professors Langbein and Waggoner call it the “no-extrinsic-evidence rule,” but I think my term is more apt for reasons that will appear hereafter. See Langbein & Waggoner, *supra* note 123, at 521.

<sup>179</sup> “[T]he real question is not what the testator meant to say, but what he meant by what he said. . . . [E]ffect is given to the intent which finds expression in the language used.” *Fidelity Title & Trust Co. v. Clyde*, 121 A.2d 625, 628 (Conn. 1956); see also, e.g., *In re Estate of Palizzi*, 854 P.2d 1256, 1259 (Colo. 1993); *McFarland v. Chase Manhattan Bank, N.A.*, 337 A.2d 1, 7 (Conn. Super. Ct. 1973), *aff'd*, 362 A.2d 834 (1975); *In re Estate of Kiel*, 357 N.W.2d 628, 631 (Iowa 1984); *In re Estate of Nagl*, 408 N.W.2d 768, 771 (Iowa Ct. App. 1987); *State ex rel. Secretary of Soc. & Rehabilitation Servs. v. Jackson*, 822 P.2d 1033, 1038 (Kan. 1991); *In re Estate of Herz*, 651 N.E.2d 1251, 1253 (N.Y. 1995) (“ordinary and natural meaning”); *In re Estate of Baxter*, 798 P.2d 644, 647–48 (Okla. Ct. App. 1990); *In re Clark*, 417 S.E.2d 856, 857 (S.C. 1992) (“ordinary and grammatical sense of the words employed”); cf., e.g., *Gillespie v. Davis*, 410 S.E.2d 613, 615 (Va. 1991) (recognizing that “there are many different shades of meaning which a group of words may convey; individuals differ in their knowledge of grammar and in their manner of expression”). Some courts have been willing to explore subjective sense when a will was prepared without the assistance of counsel. See *Matheny v. Matheny*, 392 S.E.2d 230, 233 (W. Va. 1990); see also *Bosley v. Wyatt*, 55 U.S. 390, 397 (1852) (Taney, C.J.) (questioning strict adherence to legal terms of art found within wills drawn by lay persons). But see *In re Estate of DeLong*, 788 P.2d 889, 891–92 (Mont. 1990) (warning those lay persons who wish to ensure that their intent is given effect to consult attorneys: *Caveat testator!*). Many, many commentators have poured their venom upon the plain meaning rule (see *infra* note 181) and though it is not followed uniformly, still it has exhibited a hardy resistance to criticism. For a doctrinal survey, see 4 PAGE, *supra* note 11, §§ 30.7–9, 30.21–22, 32.1, 32.10–.11.

plain meaning and cannot be construed *simpliciter*;<sup>180</sup> for there exists no linguistic ether, just a babble of relative utterances. To break ranks with the speaker and insist on giving her words their "plain" meaning, in the plain language of Professor Wigmore, is simply to substitute "the meaning of the people who did *not* write the document"—a practice Jeremy Bentham equated with *forgery*!<sup>181</sup>

Still, there is a way out of this linguistic straitjacket. The key is to be found in another variety of ambiguity: even after courts have assigned to the words of a will their plain meaning, it *still* may not be possible to pin down what those words were intended to mean, by virtue of the fact that they fail to divulge sufficient information.<sup>182</sup> As linguistic theory indicates, this insufficiency can derive from several sources. First, the words chosen, even when confined to their dictionary definitions, may have multiple meanings (a phenomenon known technically as *polysemy*). The word "estate," for example, can refer alternatively to assets the speaker seeks to bequeath *or* merely to a description of the extent of her possessions. In such a case, we have still to determine which idea the testator intended to evoke by the word.<sup>183</sup> Second, the words

<sup>180</sup> To pose the paradox: If words have a plain meaning, then whence comes the litigation over what they mean? See 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.01, at 82 (5th ed. 1992 & Supp. 1996). Cf. *supra* note 32.

<sup>181</sup> 9 WIGMORE, *supra* note 119, § 2462, at 191-92 (quoting Jeremy Bentham, *Rationale of Judicial Evidence*). For other criticism, see for example 3 RESTATEMENT OF PROPERTY, *supra* note 176, § 241 cmt. a, § 242 cmts. c & d (purporting to abolish the rule); RESTATEMENT (THIRD) OF PROPERTY, *supra* note 39, § 12.1(2) & cmt. d (same); 3 CORBIN, *supra* note 29, §§ 535, 542, 542A; JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 428-29 (Boston, Little, Brown, & Co. 1898); Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630 (1992). For a semantic discussion, see SEARLE, *Literal Meaning*, in EXPRESSION AND MEANING, *supra* note 15, at 117. But see the defense offered by Hosmer, C.J.: "This principle has the force of demonstration; for why seek, by parol, to explain that, which needs no explanation?" Hall v. Rand, 8 Conn. 560, 574 (1831). *The prosecution rests!*

<sup>182</sup> Or, the words may be self-contradictory—what Hobbes called a "nonsense" or "absurdity." HOBBS, *supra* note 177, at 113. For a modern discussion, see SCHEFFLER, *supra* note 174, at 102-07. This problem crops up occasionally in the construction of wills. See 4 PAGE, *supra* note 11, § 30.20.

<sup>183</sup> See *In re Estate of Johnson*, 630 P.2d 1039 (Ariz. Ct. App. 1981); John O. Fox, *Estate: A Word To Be Used Cautiously, If at All*, 81 HARV. L. REV. 992 (1968). But cf. *In re Estate of Kiel*, 357 N.W.2d at 631 (questioning whether the word "estate" is ambiguous when used in a will). For some other examples, see 4 PAGE, *supra* note 11, § 30.23. On polysemy, see STEPHEN ULLMANN, SEMANTICS 159-88 (1962). A related source of ambiguity is grammatical rather than lexical: words which individually are monosemous may in combination be interpreted in alternative ways, because a word within the statement could be read to modify more than one of the others—a phenomenon known as

chosen may *generalize*, adverting within their singular definitions to more than one referent. For example, a testator might bequeath her "diamond solitaire ring" to A, when either the will or other evidence reveals that the testator owned two. In such a case, we still need to establish which ring the testator meant to single out.<sup>184</sup> Third, and most important for present purposes, the words chosen may be imprecise at the fringes of their definitions, a semantic phenomenon known as *borderline vagueness*.<sup>185</sup> For instance, a testator might bequeath the "personal belongings in [my] house," to A, when a desk in the house is discovered to contain intangible securities.<sup>186</sup> Whether the words "personal belongings" encompass intangibles is not something we can clarify by turning to the dictionary.

Under current law, courts faced with these sorts of ambiguity in a will—known as a patent ambiguity if it is apparent from the face of the instrument or a latent ambiguity when it appears only in the light of external circumstances—*can* admit extrinsic evidence to interpret sense.<sup>187</sup> In the last example, a court

*amphibology*. See *id.* at 158. For some examples, see *Virginia Nat'l Bank v. United States*, 443 F.2d 1030 (4th Cir. 1971); *In re Estate of Smith*, 580 P.2d 754 (Ariz. Ct. App. 1978).

<sup>184</sup> See *Orcutt v. Hoyt*, 77 A.2d 227 (N.J. 1950); see also *Britt v. Upchurch*, 396 S.E.2d 318 (N.C. 1990). On semantic generalization, see JAN G. KOON, *AMBIGUITY IN NATURAL LANGUAGE* 119–21 (1971); SCHEFFLER, *supra* note 174, at 40–43.

<sup>185</sup> For modern treatments, see MAX BLACK, *LANGUAGE AND PHILOSOPHY* 25–58 (1949) (asserting that *all* words in a natural language are surrounded by a *borderland*); MAX BLACK, *THE LABYRINTH OF LANGUAGE* 134–38 (1968) (same); LINDA CLAIRE BURNS, *VAGUENESS* (1991); SCHEFFLER, *supra* note 174, at 37–78; TIMOTHY WILLIAMSON, *VAGUENESS* (1994). (For a further discussion of the distinction between *borderline vagueness* and *generality* and their occasional confusion, see Roy A. Sorensen, *The Ambiguity of Vagueness and Precision*, 70 PAC. PHIL. Q. 174 (1989).) Once again, Locke apprehended the germ of the idea. See LOCKE, *supra* note 174, bk. III, ch. 10, § 2. For other early discussions, see FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* ch. 2, §§ 2, 5 (Boston, Charles C. Little & James Brown, 1839); *THE FEDERALIST* No. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961).

<sup>186</sup> See *In re Estate of Harris*, 414 N.Y.S.2d 835, 839 (Surr. Ct. 1979) (emphasis omitted); see also *In re Clark*, 417 S.E.2d 856 (S.C. 1992); *Davis v. Shanks*, 898 S.W.2d 285 (Tex. 1995).

<sup>187</sup> *E.g.*, *In re Estate of Holmes*, 821 P.2d 300, 303–04 (Colo. Ct. App. 1991):

If the terms of a will are unambiguous, extrinsic evidence may not be considered to determine the testatrix's intent. However, if the language of the will, although clear on its face, is susceptible of more than one meaning when applied to the extrinsic facts to which it refers, a latent ambiguity exists and extrinsic evidence must be considered.

*Id.* See also *In re Estate of Kirk*, 907 P.2d 794, 800–01 (Idaho 1995). For a doctrinal survey, see 4 PAGE, *supra* note 11, §§ 32.2–.9. In some jurisdictions, extrinsic evidence is

could (and did) look beyond the will in order to determine whether the testator meant to signify intangibles by the phrase in question.<sup>188</sup> And given *this* power, we also have a way around the plain meaning rule: for whether a particular word or string of words requires interpretation can *itself* be ambiguous; ambiguity, so to say, is in the eyes of the beholder and can be perceived by those who are on the lookout practically anywhere. Take another example: a testator bequeaths \$10,000 to "my children," when she has two natural children and also two step-children. Is the textual reference to "children" precise (hence hamstrung by the plain meaning rule) or imprecise (being the key to evidentiary liberation)? Well, *yes* and *yes*—hence either.<sup>189</sup> This duality is known in linguistic theory as *higher-order vagueness* or, more felicitously, *the vagueness of vagueness*.<sup>190</sup> Doubtless, it is the culprit responsible for those cases, not few in number, where majority and dissenting opinions wrangle over whether any ambiguity exists in the testamentary instrument, whether the case is bound by the plain meaning rule or freed by the

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inadmissible to clarify a patent ambiguity, however. *See infra* note 195.

<sup>188</sup> *See supra* note 186.

<sup>189</sup> Whereas some early cases took the view that this scenario comes under the plain meaning rule (e.g., *Sydnor v. Palmer*, 29 Wis. 226, 244–45 (1871)), the modern approach has been to admit extrinsic evidence in such cases. *See* Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917, 940–42 & n.95 (1989). Cases are compiled in 4 PAGE, *supra* note 11, § 34.17; J. Kraut & B. de R. O'Byrne, Annotation, *Testamentary Gift to Children as Including Stepchild*, 28 A.L.R.3d 1307 (1969).

Take another example: testator bequeaths a portion of his estate "[t]o my housekeeper of many years . . . if she be in my employment at the time of my death." *In re Estate of Quinn*, 450 N.W.2d 432, 433 (S.D. 1990). Subsequently, the testator's health deteriorates and he checks into a hospital. The housekeeper comes to visit him frequently and he expresses the desire that she resume work as soon as he can return to his apartment but dies without doing so. Does "if she is in my employment" plainly mean *if she is being paid for her labor*, or, in context, should it be interpreted to mean *if she does not resign her position*? Is there ambiguity as to whether the words need clarifying? Enough, at least, for the trial and appellate courts to take opposing views on the issue. *See id.* at 433–34.

<sup>190</sup> *See* BURNS, *supra* note 185, at 77–80; WILLIAMSON, *supra* note 185, at 2–3, 57–58 *passim*; Dominic Hyde, *Why Higher-Order Vagueness Is a Pseudo-Problem*, 103 MIND 35 (1994); Mark Sainsbury, *Is There Higher Order Vagueness?*, 41 PHIL. Q. 167 (1991); Roy A. Sorensen, *An Argument for the Vagueness of 'Vague,'* 45 ANALYSIS 134 (1985); Michael Tye, *Why the Vague Need Not Be Higher-Order Vague*, 103 MIND 43 (1994); Crispin Wright, *Further Reflections on the Sorites Paradox*, 15 PHIL. TOPICS, Spring 1987, at 227, 261–68, 279–80. For an early recognition, see Bertrand Russell, *Vagueness*, 1 AUSTRALASIAN J. PSYCHOL. & PHIL. 84, 87 (1923), reprinted in 9 COLLECTED PAPERS OF BERTRAND RUSSELL 145 (John G. Slater ed., 1988).



latent ambiguity rule.<sup>191</sup> Oddly, though, few courts have discerned the slipperiness of this semantic issue.<sup>192</sup> Some courts have even claimed that the wills they construed were “clearly ambiguous”<sup>193</sup>—a phrase which, on reflection, is amusingly ironic, not to say oxymoronic!

And so we may conclude, appropriately enough, that the plain meaning rule is meaningless in *two* senses of the word: meaningless in terms of theoretical incoherence and also meaningless in terms of functional insignificance.<sup>194</sup> But this insignificance also suggests a structural inconsistency. For if the variance of individual usage of words and the vagueness of common usage of words are overlapping concepts, tending so to

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<sup>191</sup> The U.S. Supreme Court has occasionally argued over this issue in the context of statutory interpretation. See *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757 (1994) (see especially 1766) (Scalia, J. versus Souter, J., each playing *against* type); *Dewsnup v. Timm*, 112 S. Ct. 773, 778 (“given the ambiguity in the text”), 780 (“unambiguously provides”) (1992) (Blackmun, J. versus Scalia, J., here joined by Souter, J.). In connection with probate code construction, see *Zuckerman v. Alter*, 615 So. 2d 661 (Fla. 1993). In connection with testamentary instruments, see *Tucker v. Bradford*, 599 So. 2d 611 (Ala. 1992); *In re Estate of Walker*, 609 So. 2d 623 (Fla. Dist. Ct. App. 1992); *State ex rel. Secretary of Soc. & Rehabilitation Servs. v. Jackson*, 822 P.2d 1033 (Kan. 1991); *In re Dimmitt's Estate*, 3 N.W.2d 752 (Neb. 1942); *In re Estate of Bergau*, 693 P.2d 703 (Wash. 1985). Sometimes even a single opinion has swayed back and forth on the question. See *Wilson v. Flowers*, 277 A.2d 199, 206 (N.J. 1971) (“[P]hilanthropic’ . . . has come to mean [‘charitable’] in modern usage. However, even if it has not, it is ambiguous enough to be construed as such.”). See also 3 CORBIN, *supra* note 29, § 542, at 122 & n.85.20 (on contract interpretation).

<sup>192</sup> But see *Barbee v. United States*, 392 F.2d 532, 535 n.4 (5th Cir. 1968) (Goldberg, J.) (observing that cases applying the plain meaning rule to statutes “continually beg an important issue. Whether or not the words of a statute are clear is itself not always clear.”).

<sup>193</sup> E.g., *In re Hollenbeck v. Gray*, 185 N.W.2d 767, 769 (Iowa 1971); *In re Barnett*, 245 So. 2d 418, 422 (La. 1971); *Estate of Taitt*, 386 N.Y.S.2d 308, 310 (Surr. Ct. 1976).

<sup>194</sup> As one court complained dryly, “[s]ome will find ambiguity even in a ‘No Smoking’ sign . . .” *International Union UAW v. General Dynamics Land Sys. Div.*, 815 F.2d 1570, 1575 (D.C. Cir. 1987) (Buckley, J.). Fulfilling the prophecy, in effect, see *NationsBank of N.C. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810 (1995) (finding ambiguity in the word “insurance”), strongly criticized in William Funk, *Supreme Court News*, 20 ADMIN. & REG. L. NEWS, Spring 1995, at 4, 5. The functional insignificance of the plain meaning rule does, however, have the very significant consequence of enhancing the power of courts, *sotto voce*, to reach results in keeping with their own moral lights. Whether ambiguity is or is not discovered by the court may depend tacitly on the outcome of such a finding. For an unusually blatant example, see *Re Herlichka*, 3 D.L.R.3d 700 (Ontario 1969). But see *In re Estate of Kiel*, 357 N.W.2d 628, 630–31 (Iowa 1984) (“[A] court may not, under the guise of ambiguity, implement broad principles of equity and justice.”).

blur together that they often cannot be told apart, then why treat them differently under the law?<sup>195</sup> Both are aspects of the same core problem: determining what a testator sought to convey by the words she employed. To draw a legal distinction between phenomena that are often indistinguishable seems on the face of it a dubious exercise.

Is there any justification for the plain meaning rule at all? Its origins appear to lie, once again, in the notion of words as *performatives*, as doing things.<sup>196</sup> here, however, the invocation of a verbal formula producing a result is deemed to do so whether the testator (like the sorcerer's apprentice) intended to or not. The time for such notions has long since passed,<sup>197</sup> but in their wake courts

<sup>195</sup> Corbin comments in connection with contracts: "It is remarkable how much time has been wasted (at the expense of the litigants and of the state) in determining whether the words used by the parties are 'ambiguous,' when the issue . . . is . . . the 'intention of the parties' . . . ." 3 CORBIN, *supra* note 29, § 542, at 122-24. Historically, lawmakers drew a further distinction between latent and patent ambiguities, admitting extrinsic evidence only in the first case and not in the second. Derived from one of Bacon's maxims, this "artificial distinction" has long been criticized and is widely abolished today. See 3 RESTATEMENT OF PROPERTY, *supra* note 176, § 241 cmt. a, § 242 cmt. j; RESTATEMENT (THIRD) OF PROPERTY, *supra* note 39, § 11.2(a) & cmt. d; MCGOVERN ET AL., *supra* note 8, § 6.1, at 237-38; 4 PAGE, *supra* note 11, § 32.7, at 258-59; THAYER, *supra* note 181, at 423-25; 9 WIGMORE, *supra* note 119, § 2470, at 236-38, § 2472, at 249-50 (quotation at 250). For a discussion of the case law, see 4 PAGE, *supra* note 11, § 32.7.

<sup>196</sup> See 9 WIGMORE, *supra* note 119, § 2461, at 187-88.

<sup>197</sup> By contrast, a testator must intend to give legal effect to words in order for them to comprise (as opposed to explicate the substance of) a will. See *supra* notes 24, 27 and accompanying text. The idea of verbal formulae as substantively performative similarly underlay the ancient writ system in Great Britain, whose forms had to be observed not merely to the word but literally to the letter. See 3 BLACKSTONE, *supra* note 26, at \*409; S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 27-28 (1969). It was a requirement that again drew protracted criticism and has long since been abandoned. See FED. R. CIV. P. 8(f). It bears noticing that even in the sixteenth century such ideas were not universally shared. Swinburne breasted the tide by rejecting the plain meaning rule:

The will therefore and meaning of the testator, ought before all thinges to bee sought for diligently . . . And as to the sacred anker ought the judge to cleave unto it: Pondering not the words, but the meaning of the testator. For although no man be presumed to thinke otherwise then hee speaketh . . . yet cannot every man utter al that he thinketh, and therefore are his wordes subjecte to his meaning. And as the mind is before the voyce, (for we conceive before we speake) so is it of greater power; for the voyce is to the minde, as the servant is to his Lord.

SWINBURNE, *supra* note 25, at 9a; see also *id.* at 190a-91 (rejecting the requirement that the testator use legal terms of art to express intent: "the wil and the intent of the testator is preferred before formal or prescript wordes"). Swinburne's distinction of thought from

have made a number of substantive arguments in favor of the plain meaning rule: it has been suggested, for example, that "if a man was assured that whatever words he made use of his meaning only should be considered, he would be very careless about the choice of his words, and it would be the source of infinite confusion and [u]ncertainty . . . ."<sup>198</sup> The plain meaning rule encourages the testator *ex ante* to select her words carefully, averting costly litigation—thus helping to perform what we would now call the channelling function of the Statute of Wills.<sup>199</sup> And the rule is said also to lessen the risk of fraudulent claims of unintended constructions,<sup>200</sup> thus mirroring the evidentiary function of will formalities.<sup>201</sup>

The potency of these arguments is open to question. The canny Civilians, having bequeathed to us the plain meaning rule, have themselves long since

language, which he used to undermine the plain meaning rule, of course stands today as a basic tenet of linguistic science. See STEVEN PINKER, *THE LANGUAGE INSTINCT* 55–82 (1994).

<sup>198</sup> *Throckmerton v. Tracy*, 75 Eng. Rep. 222, 251 (K.B. 1554–55) (Brook, C.J.). "But," added Brook,

in testaments the intent only shall be observed and considered, because it [is] presumed that the testator has not time to settle every thing according to the rules of law, and wills are most commonly made on a sudden, and in the testator's last moments; and so is the difference between them and acts executed in the party's life-time.

*Id.* at 251. Echoing Brook's defense of plain meaning, see *Hick v. Dring*, 105 Eng. Rep. 447, 450 (K.B. 1814) (Ellenborough, C.J.); *Perrin v. Blake* (Ex. Ch. 1772) (Blackstone, J.), reprinted in FRANCIS HARGRAVE, *A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND* 487, 495 (London 1787). Three and a half centuries later, Justice Holmes characterized the plain meaning rule as a literary form of the prudent man standard. See Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 418 (1899). Yet Holmes was also well aware of the idiolectic significance of words. See *Towne v. Eisner*, 245 U.S. 418, 425 (1917).

<sup>199</sup> See *supra* notes 31–32 and accompanying text.

<sup>200</sup> See *Goode v. Riley*, 28 N.E. 228, 228 (Mass. 1891) (Holmes, J.) ("[Y]ou cannot prove a mere private convention . . . to give language a different meaning from its common one. It would offer too great risks if evidence were admissible to show that when they said 500 feet they . . . mean[t] 100 inches.") (citations omitted); *Moseley v. Goodman*, 195 S.W. 590, 593 (Tenn. 1917) ("It is not permissible to go outside of the will, and show that the testator was accustomed to attach a meaning to these words peculiar to himself. If such evidence were permissible, truly no will would be safe.").

<sup>201</sup> See *supra* notes 12–14, 29–30 and accompanying text. The problem here addressed is structurally analogous to the two-sided issue of admitting extrinsic evidence in the context of will formalization and correction of mistakes, discussed *supra* Part II.

abandoned it without ill consequence.<sup>202</sup> Whereas statutes and contracts *depend* on some shared understanding of meaning, a will, expressing unilateral decisions, does not—hence testators may be more prone to linguistic idiosyncrasy and also cause less harm by it.<sup>203</sup> At any rate, these arguments would appear no less pertinent to the problem of semantic vagueness and generality, where they have been ignored, than to the problem of idiolectic glosses, where they have been followed.

What is more, having promulgated the plain meaning rule, lawmakers have not even applied it consistently within its ostensible parameters. Under a related doctrine known as the personal usage rule, the meaning of a testator's words when used to denote a particular person or thing *can* be elucidated by consulting extrinsic evidence, including the testator's personal vocabulary.<sup>204</sup> One is again hard pressed to discern any reason for distinguishing this scenario from those otherwise governed by the plain meaning rule. Identifications are, of course, an obvious and abundant source of idiolectic variation—a fact which our language concedes by its adoption of the expression *nicknames*. Yet those variations are conceptually indistinguishable from others and would seem to carry in their train the very same channeling and evidentiary problems.<sup>205</sup> Perhaps we could posit that by making allowances for personal usages only in

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<sup>202</sup> See RESTATEMENT (THIRD) OF PROPERTY, *supra* note 39, § 12.1 reporter's note 4; Langbein & Waggoner, *supra* note 123, at 527–28. On the rule's civil law origins, see McGovern, *supra* note 172, at 315; Schiller *supra* note 168, at 760–61.

<sup>203</sup> Noting this distinctive quality of wills, see for example RESTATEMENT (THIRD) OF PROPERTY, *supra* note 39, § 12.1 reporter's note 4; ATKINSON, *supra* note 30, § 60, at 286; 3 CORBIN, *supra* note 29, § 532, at 4–5; 4 PAGE, *supra* note 11, § 30.1, at 2–3, § 30.2, at 8; Holmes, *supra* note 198, at 419–20. Nor is it probable that the plain meaning rule will have significant *ex ante* consequences: lay persons who draw up their own wills are unlikely to be aware of a rule as obscure as this, and so its existence probably will not influence their choice of words before the fact (assuming they are even cognizant that their idiolect differs from that of a court); whereas, attorneys who prepare wills for others need no encouragement to use technical language, for it is their mother tongue! Cf. *supra* notes 30–31, 33 and accompanying text.

<sup>204</sup> For a brief doctrinal survey, see ATKINSON, *supra* note 30, § 60, at 285–86. The *locus classicus* is Moseley v. Goodman, 195 S.W. 590 (Tenn. 1917). See also 3 RESTATEMENT OF PROPERTY, *supra* note 176, § 242 cmt. d (expanding the concept); RESTATEMENT (THIRD) OF PROPERTY, *supra* note 39, § 11.2(b)(3) & cmt. r (same). On the semantics of naming, which has spawned a large literature, see MICHAEL DEVITT, DESIGNATION (1981); JAY F. ROSENBERG, BEYOND FORMALISM: NAMING AND NECESSITY FOR HUMAN BEINGS (1994); THE PHILOSOPHY OF LANGUAGE 187–347 (A.P. Martinich ed., 2d ed. 1990).

<sup>205</sup> “The statement that no word or phrase has one true and unalterable meaning is as true of proper names as it is of common nouns and verbs.” 3 CORBIN, *supra* note 29, § 535, at 16.

those semantic instances where they are likeliest to arise, lawmakers have come up with an efficient, limited solution to this problem of construction. It's a debatable point. What is indubitable is that the coexistence of the two rules has never been adequately, or for that matter inadequately, addressed either in the judicial or scholarly sources.

### C. Time Ambiguities

A second genus of ambiguity in wills stems not from the uncertain meaning of words, but rather from the passage of time. Some hiatus always separates the moment when a will is executed from the moment when it matures. If occurrences significant to the testator's estate plan have intervened, their effect on her intent—not reflected in the executed writing—raises another host of construction problems.<sup>206</sup>

The core difficulty here identified is not confined to the interpretation of wills, of course. It also arises, *inter alia*, in connection with statutes and constitutions. From these vantage points, the appropriate treatment of time ambiguities has been vigorously disputed and much puzzled. The central approach taken in the law of wills is, however, a matter of consensus: in this arena, courts uniformly take an "originalist" perspective, adhering to the estate plan as the testator originally intended it to be carried out.<sup>207</sup> With only a few exceptions<sup>208</sup> (but exceptions that have themselves spawned

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<sup>206</sup> This phenomenon is known in the trade as the problem of "stale" wills. Professional estate planners have at their disposal two preservatives: they can anticipate future contingencies in their original estate plan, or they can update wills periodically. For an estate planning discussion, see Addison E. Dewey, *Testators Who Die Intestate*, 7 PROB. L.J. 221 (1987).

<sup>207</sup> See UNIF. PROBATE CODE, *supra* note 5, § 2-508; 4 PAGE, *supra* note 11, § 30.26.

<sup>208</sup> In the event of a drastic change in domestic circumstances, courts have imputed changes of intent and implemented them "by operation of law." The three usual instances are *marriage*, where intent to bequeath an intestate share to the omitted spouse is inferred despite failure to revise the pre-marital will, *birth of a child*, where intent to bequeath an intestate share to the omitted child is likewise inferred despite failure to revise the pre-natal will, and *divorce*, where intent to revoke bequests to the divorced spouse is inferred despite failure to revise the pre-dissolution will. See MCGOVERN ET AL., *supra* note 8, §§ 3.6-7, 5.4. For historical discussions, see J.H. Beuscher, Note, *Wills—Revocation by Divorce of Testator*, 5 WIS. L. REV. 377 (1930); W.A. Graunke & J.H. Beuscher, *The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator*, 5 WIS. L. REV. 387 (1930). These inferences may be related to the presumption against absurd or unreasonable testamentary intentions (see 4 PAGE, *supra* note 11, § 30.12) which has also been made in the venue of statutory construction, see for example *United States v. Wilson*, 112 S. Ct. 1351, 1354 (1992); *United States v. Providence Journal Co.*, 485 U.S.

inconsistencies<sup>209</sup>), courts have declined to second-guess the testator's eventual wishes on the basis of changed circumstances.<sup>210</sup> Such an approach appears

693, 710 (1988) (Stevens, J., dissenting), although they may also reflect the independent public policy of protecting the family. See the brief discussion in Elizabeth Durfee, *Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator*, 40 MICH. L. REV. 406, 416 (1942). For early discussions, see 2 BLACKSTONE, *supra* note 26, at \*376, \*502-03; 4 KENT, *supra* note 172, at 506-13; SUGDEN, *supra* note 14, at 201-04 app. (urging abolition of these inferences); Sugden, *supra* note 31, at 29-31 (same). For an earlier common law variant of revocation by operation of law, see SWINBURNE, *supra* note 25, at 286 (indicating the implied revocation of a bequest to a legatee who "become[s] enemie to the testator").

<sup>209</sup> As codified in the revised Uniform Probate Code, provisions for changes of an estate plan by operation of law contain asymmetries that are never explained, because the separate provisions covering each of them are nowhere compared in the accompanying comments or scholarly commentary. Compare UNIF. PROBATE CODE, *supra* note 5, § 2-301(a) (revising pre-marital wills by implication of marriage) with *id.* § 2-804(b) (revising pre-dissolution wills along with other will substitutes by implication of divorce); and compare *id.* § 2-301(a)(1) (excepting from revision pre-marital wills made in contemplation of marriage) with *id.* § 2-804(b) (containing no comparable exception for pre-dissolution wills made in contemplation of divorce); and compare *id.* § 2-301(a) & cmt. (subjecting to revision pre-marital wills that do bequeath to the individual who subsequently became a spouse, but which fail to contemplate that individual as a spouse) with *id.* § 2-302(a) (failing to subject to revision pre-adoption wills that provide for an individual who the testator subsequently adopts as a child, *cf. In re McPeak Estate*, 534 N.W.2d 140 (Mich. Ct. App. 1995)); and compare RESTATEMENT (SECOND) OF PROPERTY, *supra* note 33, § 31.2 cmt. c, illus. 5-9 & reporter's note 3 (gifts made in contemplation of marriage are by implication conditional on subsequent marriage) with UNIF. PROBATE CODE, *supra* note 5, §§ 2-508, 2-804(f) (creating no comparable implied condition of subsequent marriage or implied revocation of bequests made in contemplation of marriage when the marriage fails to ensue); and compare *id.* § 2-601 & cmt. (extrinsic evidence of intent contrary to rules of construction applicable to time ambiguities in general is admissible) with *id.* §§ 2-301(a)(2), 2-302(b)(1), 2-804(b) (rendering inadmissible, for the most part, extrinsic evidence of intent contrary to the rules governing pre-marital, pre-dissolution, and pre-natal wills). Noting two inconsistencies between the elective share and the treatment of pre-marital wills under the Uniform Probate Code, see DUKEMINIER & JOHANSON, *supra* note 142, at 549. For (non-comparative) commentary, see Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683, 689-701, 748-51 (1992).

<sup>210</sup> To grant courts discretionary authority to revise wills on the basis of any changed circumstances would "inevitably invite litigation and 'produce infinite uncertainty and delay in the settlement of estates,' . . . ." *Hoitt v. Hoitt*, 3 A. 604, 616 (N.H. 1886). In some cases, it is unclear whether the testator herself anticipated the possibility of a change of circumstances and whether the words of her will are intended to provide for that future contingency or not. The phrase "to A and her heirs," for instance, could be meant to

warranted: for the central argument against originalism—that, in practice, the unwieldiness of a constitutional or legislative body precludes periodic review and systematic revision of its texts by the body itself<sup>211</sup>—fails to apply to testamentary instruments. It seems reasonable enough to assume that once an estate plan the testator has troubled herself to execute no longer corresponds with her wishes, she will trouble herself to amend it. Failure to amend, more likely than not, reflects an advertent decision on the testator's part,<sup>212</sup> and so courts justifiably may infer that the intent expressed in her last will reflects her intent at death (when the transfer becomes effective), even if the estate plan has been overtaken by significant events.<sup>213</sup>

So far, so good. Still, this principle cannot be followed in every instance.

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designate an alternative taker in the event that A predeceases the testator, or it could be meant simply to bequeath to A a fee simple absolute. Such facts present a word ambiguity rather than a time ambiguity. *E.g.*, *Jackson v. Schultz*, 151 A.2d 284 (Del. Ch. 1959); *Estate of Renner*, 895 S.W.2d 180 (Mo. Ct. App. 1995). Once again, however, whether the words of a will are ambiguous concerning their application to the future change of circumstances that occurs can itself be ambiguous. *See, e.g.*, *In re Estate of Bulger*, 586 N.E.2d 673 (Ill. App. Ct. 1991) (where the trial and appellate courts differed over whether testamentary language concerning future circumstances required construction); *In re Estate of Quinn*, 450 N.W.2d 432 (S.D. 1990) (discussed *supra* note 189). Therefore, courts again have some leeway (if they are minded to use it) to find ambiguity in the words of a will as a surreptitious means of curing time ambiguities.

<sup>211</sup> *E.g.*, WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 50 (1994); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 236 (1980), reprinted in *INTERPRETING THE CONSTITUTION* 227 (Jack Rakove ed., 1990).

<sup>212</sup> *E.g.*, *In re Estate of Baxter*, 798 P.2d 644, 647 (Okla. Ct. App. 1990). This is not always true, of course—and in some instances it is *definitely* not true: Where the testator after executing a will loses testamentary capacity, or where the event that changes the testator's intent simultaneously disables the testator from altering her will (common calamities and intentional inflictions of mortal wounds being the principal examples), we can be certain the testator's failure to alter her will was not advertent. In such cases, lawmakers have had to draw inferences about the effect of changed circumstances on testamentary intent. These problems are handled under the doctrine of substituted judgment, simultaneous death laws, and slayer laws, respectively. On these doctrines, see MCGOVERN ET AL., *supra* note 8, §§ 2.4, 10.5; Fellows, *supra* note 51, at 622–30.

<sup>213</sup> And the alternative: “[W]here are we to stop? Is the rule to vary with every change which constitutes a new situation giving rise to new moral duties on the part of the [testator]?” *White v. Barford*, 105 Eng. Rep. 739, 739 (K.B. 1815) (Ellenborough, C.J.). The very fact that this general rule of construction is in place should also operate *ex ante* to encourage testators to update their wills. For courts to undertake this task on the testator's behalf—apart from being problematic—is obviously inefficient from the perspective of legal process. *See also supra* note 210.

In some cases, circumstances will have rendered impossible the literal effectuation of testamentary intent. When beneficiaries named in a will predecease the testator, she cannot (except in some metaphysical sense) give them property—they no longer possess the capacity to enjoy it. Similarly, when property specifically bequeathed in a will has departed the testator's ownership before her death, she cannot dispose of it. Assuming it still exists, the property is no longer hers to give away.

Faced with a statute that cannot be implemented—unconstitutionality being the usual stumbling block—courts simply hold it void, restore the status quo, and leave it to the legislature to contrive a viable alternative. Faced with an impossible bequest, courts cannot restore the status quo, any more than they can bring the testator back to life: having failed to revise her will before her death, the testator manifestly succumbed to distraction or procrastination and has lost the chance to correct her oversight. By default, the lot falls to lawmakers; they must now pencil in revisions calculated best to accord with the testator's probable intent, had she anticipated the circumstance that foiled her estate plan.

That was not the traditional theory, however. Early English courts took the view that when beneficiaries predeceased a testator, their bequests "lapsed" into the residuary, not because that was what the testator would have wanted, but rather by necessary implication of the fact that they no longer existed: "For it is a principle in the law that in all gifts . . . there ought to be a donee *in esse* . . . . For if there be none such *in rerum naturâ* when the thing ought to vest, the gift shall be void."<sup>214</sup> By the same token, when property specifically bequeathed by a testator failed to survive her, the bequest was "adeemed by extinction": The beneficiary took nothing, "there [being] nothing on which the bequest can operate. And I do not think that the question in these cases turns on the intention of the testator."<sup>215</sup> This came to be known as the identity theory of ademption.

By the nineteenth century, lawmakers rejected such syllogistic analyses in the context of lapse, accepting that the problem was one of intent effectuation after all. Because "[t]he rule, that gifts lapse . . . defeats in many cases the

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<sup>214</sup> *Brett v. Rigdon*, 75 Eng. Rep. 516, 524 (C.P. 1568); see also 1 JARMAN, *supra* note 118, at 438 (quoting 1st ed., 1841-43). On the early common law of lapse, see SWINBURNE, *supra* note 25, at 289a-92a.

<sup>215</sup> *Stanley v. Potter*, 30 Eng. Rep. 83, 84 (Ch. 1789) (Thurlow, C.). See also *Ashburner v. MacGuire*, 29 Eng. Rep. 62 (Ch. 1786) (Thurlow, C.). Intent, however, had been considered in still earlier discussions of the ademption problem, though the references are sparse. For a historical discussion, see Joseph Warren, *The History of Ademption*, 25 IOWA L. REV. 290 (1940). On the early common law of ademption, see SWINBURNE, *supra* note 25, at 281a, 292a-93a.



intention of the Testator," Parliament in 1837 refined the doctrine, imputing an intent that property go to decedent beneficiaries' estates rather than flow into the residuary when the intended beneficiaries were lineal descendants of the testator.<sup>216</sup> American statutes, several of which antedated the English version, have mandated variants of this scheme. These revised approaches to the problem are predicated on the assumption that when a testator bequeaths to her close relatives, her wish to provide for them usually extends to their progeny; the testator's decision to benefit only the older generation ordinarily follows from a desire to give it priority, and so when members of that generation fail to survive, the testator will likely wish their descendants to take in their stead. When a testator bequeaths to nonrelatives, by contrast, she is less apt to have a sociological relationship with their offspring, and so will less probably desire to treat them as testamentary surrogates; lapse into the residuary then will more likely accord with the testator's preferences.<sup>217</sup>

One might have expected that the theoretical premises of ademption would have evolved *pari passu* with changing conceptions of lapse. Instead, in most jurisdictions the identity theory of ademption has lingered, even as its analogue in the context of lapse long ago fled the scene. Many courts today continue to parrot the notion that ademption "is not founded on any presumed intention of the testator" but rather follows from the "fact that the thing bequeathed does not exist."<sup>218</sup> The upshot is an odd conceptual asymmetry between two

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<sup>216</sup> See 7 Will. 4 & 1 Vict., ch. 26 (1837) (Eng.); Susan F. French, *Antilapse Statutes Are Blunt Instruments: A Blueprint for Reform*, 37 HASTINGS L.J. 335, 338 n.13 (1985) (quoting the drafters' report).

<sup>217</sup> This inference is spelled out, for example, in *In re Estate of Niehenke*, 818 P.2d 1324, 1328 (Wash. 1991). Noting generally the primacy of intent-effectuation as the premise for modern statutes governing lapse, see RESTATEMENT (SECOND) OF PROPERTY, *supra* note 33, § 18.6 cmt. a; ATKINSON, *supra* note 30, § 140, at 779; 6 PAGE, *supra* note 11, § 50.10, at 77. For a catalogue of the statutes, see RESTATEMENT (SECOND) OF PROPERTY, *supra* note 33, § 34.6 statutory note. For criticisms of the modern statutory schemes, see French, *supra* note 216; Philip Mechem, *Some Problems Arising Under Anti-Lapse Statutes*, 19 IOWA L. REV. 1 (1933); Patricia J. Roberts, *Lapse Statutes: Recurring Construction Problems*, 37 EMORY L.J. 323 (1988). For an inconsistency between the statute governing lapse and the statute governing absentee beneficiaries in the state of Washington, see Mark Reutlinger, *Legislative Lapses: Some Suggestions for Probate Code Reform in Washington*, 10 U. PUGET SOUND L. REV. 173, 226-27 (1987).

<sup>218</sup> *In re Estate of Fox*, 431 A.2d 1008, 1010 (Pa. 1981) (quoting *Hoke v. Herman*, 21 Pa. 301, 305 (1853)). "[I]ntention has nothing to do with the matter." *In re Wright's Will*, 165 N.E.2d 561, 562 (N.Y. 1960); see also, e.g., *In re Charles' Estate*, 158 N.Y.S.2d 469, 472 (App. Div. 1957); MCGOVERN ET AL., *supra* note 8, § 10.1, at 397 & nn.3-4. Cf. *In re Estate of Mayberry*, 886 S.W.2d 627, 630 (Ark. 1994) ("[I]n most instances a determination of whether a change in the gift's form or substance occurred will decide the

doctrines that form close structural parallels but which nonetheless have developed independently.<sup>219</sup>

The theoretical cleft between ademption and lapse is reflected in the corollary rules that have grown up around them. One way to excuse any rule of construction is to point out that a testator who disapproves can still effectuate her intent by executing a new will. But this reasoning, which of course applies only to an attentive testator, collapses altogether when for one reason or another the testator loses her ability to revise her estate plan. That scenario proved too much even for lawmakers wedded to the identity theory to swallow, and accordingly many courts have reversed the presumption in favor of ademption if the conversion of bequeathed property occurs while the testator lacks testamentary capacity<sup>220</sup> or where her death follows hard on the conversion, the testator then lacking a realistic opportunity to amend her will.<sup>221</sup> In such cases, the beneficiary receives a general pecuniary bequest or

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issue of what the testator intended."); *Wasserman v. Cohen*, 606 N.E.2d 901, 902-03 (Mass. 1993) ("The doctrine seeks to give effect to a testator's probable intent by presuming he intended to extinguish a specific gift of property when he disposed of that property prior to his death.").

<sup>219</sup> One conceivable justification for the distinction is the administrative cost of determining the pecuniary value of a specifically bequeathed item that, absent the identity theory of ademption, would have to be substituted for the item, were it lost or conveyed. No comparable administrative cost is entailed in determining the substitute for a predeceasing beneficiary. Recognizing this difficulty in connection with ademption, see Philip Mechem, *Specific Legacies of Unspecific Things*—*Ashburner v. MacGuire Reconsidered*, 87 U. PA. L. REV. 546, 547, 550 (1939); see also *In re Slater*, 1 Ch. 665, 672 (Ch. App. 1907) (hinting at the policy); *Wasserman*, 606 N.E.2d at 902 (same).

<sup>220</sup> "[I]t seems unfair that acts of . . . [a] guardian should work an ademption when the incompetent has no opportunity to remedy the situation by making a fresh will." MODEL PROBATE CODE, *supra* note 5, § 231 & cmt. "[T]he competent testator can always change his will following changes in the property which he owns. When, however, specifically devised property was removed from a testator's estate during incompetency, application of the identity theory seems unjust." *In re Estate of Larsell*, 495 P.2d 57, 61 (Or. Ct. App. 1972), *aff'd*, 503 P.2d 500 (Or. 1972). Applying the same principle where the testator "although not legally declared incompetent, was clearly under the evidence unable to manage her affairs," see *In re Estate of Kolbinger*, 529 N.E.2d 823, 829-30 (Ill. App. Ct. 1988). For doctrinal surveys, see 6 PAGE, *supra* note 11, § 54.18; Jeffrey F. Ghent, Annotation, *Ademption or Revocation of Specific Devise or Bequest by Guardian, Committee, Conservator, or Trustee of Mentally or Physically Incompetent Testator*, 84 A.L.R.4th 462 (1991).

<sup>221</sup> The typical scenario would be where the testator dies, or is mortally wounded, in a disaster that also destroys the property bequeathed. In such a case, "there are no facts from which an intent [to adeem] can be inferred." *In re Estate of MacDonald*, 283 P.2d 271, 274

insurance proceeds in lieu of the missing property.

These exceptions to the identity theory, now codified in many jurisdictions, are themselves its most damning indictment. Notice what lawmakers are telling us here: where the testator cannot alter her will, we are told, the balance of probabilities are that she would prefer that bequests not be adeemed. This, to be sure, is an empirical question, but assuming *ex hypothesi* that the inference underlying these exceptions is correct, does it not then follow that non-adeemption should be our *usual* default rule, to protect as well the testator at liberty to update her will who simply neglects to do so? Were intent-effectuation our goal, this conclusion would seem inescapable:<sup>222</sup> But the

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(Cal. Dist. Ct. App. 1955); *see also* *Wilmerton v. Wilmerton*, 176 F. 896 (7th Cir. 1910); *In re Estate of Wolfe*, 208 N.W.2d 923 (Iowa 1973); *White v. White*, 251 A.2d 470 (N.J. Super Ct. Ch. Div. 1969). *But see In re Barry's Estate*, 252 P.2d 437 (Okla. 1952). For a doctrinal survey, *see* John P. Ludington, Annotation, *Disposition of Insurance Proceeds of Personal Property Specifically Bequeathed or Devised*, 82 A.L.R.3d 1261 (1978). In one curious case, where a testator had the misfortune to book passage on the *Lusitania* and perished along with the jewelry she had bequeathed, the court ruled that the bequest had not been adeemed for the reason that the property was not destroyed during her lifetime; for adeemption applies only where the subject matter is converted *before* the testator's death. *See In re Shymer's Estate*, 242 N.Y.S. 234 (Surr. Ct. 1930); *see also* *Thompson v. Ford*, 236 S.W. 2 (Tenn. 1921). This led one commentator to note that the issue had hinged on the *solubility* of the property in question. *See* Recent Case, *Legacies and Devises—Adeemption—Death of Testatrix and Loss of Property Specifically Bequeathed in Common Disaster*, 43 HARV. L. REV. 1311 (1930).

<sup>222</sup> A possible counter-argument is that when a testator possesses capacity, her decision to alienate specifically bequeathed property itself manifests an intent to adeem, *see* William H. Page, *Adeemption by Extinction: Its Practical Effects*, 1943 WIS. L. REV. 11, 20 & n.38, which (assuming the doctrine of acts of independent significance does not intervene, *see supra* note 85 and accompanying text) is lacking when her property is subject to a conservatorship. Such an analysis would, however, suggest the need to distinguish between inferences of intent concerning *voluntary* alienation on the one hand and *involuntary or accidental* alienation on the other, a distinction which is of no consequence under the identity theory. *See* ATKINSON, *supra* note 30, § 134, at 743. Suggesting such a general distinction, *see* MCGOVERN ET AL., *supra* note 8, § 10.1, at 403–04. Still, the assumption that intentional sale by the testator of an asset she has specifically bequeathed in and of itself implies an intent to alter her estate plan strikes me as dubious; very likely, such acts are performed without heed to their testamentary consequences, an intuition shared by Professor Page. *See* 6 PAGE, *supra* note 11, § 54.15, at 266; *see also supra* text accompanying note 85.

Intent-effectuation aside, prevailing exceptions to the identity theory arguably present the least substantial administrative costs of valuing lost specific bequests. *See supra* note 219. Where property has been liquidated by a conservator on the testator's behalf, the conservator has a fiduciary obligation to keep records of the transaction. And where a sale price or insurance proceeds are owed on property sold or destroyed shortly before death,

trouble is that the identity theory rests not upon intent, but rather on a hollow abstraction—one that gave way long ago in connection with lapse. As a consequence, the law of lapse makes no analogous exceptions for beneficiaries who predecease the testator while she lacks capacity or within close proximity of her own death. *It does not have to*: its rules are already geared toward effectuating the probable intent of a testator who, *for whatever reason*, fails to update her estate plan in the face of her beneficiaries' mortality.<sup>223</sup>

The callousness of the ademption doctrine to the intent of the testator has been noticed and criticized for a long time.<sup>224</sup> Nonetheless, the drafters of the

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value can again simply be determined by looking to the sum due.

<sup>223</sup> By statute in all jurisdictions, the principles of lapse expressly extend to cases in which the testator and beneficiary both die in a common calamity—the so-called “simultaneous death” problem. *E.g.*, UNIF. PROBATE CODE, *supra* note 5, § 2-702. This problem mirrors that in which the testator and property bequeathed both expire in a common calamity—which might be dubbed by analogy the problem of “simultaneous death and destruction”—where, by contrast, the principles of ademption are generally held *not* to apply. In at least one published case, both issues arose at once and were treated without comparison. *See In re Buda's Will*, 197 N.Y.S.2d 824 (Surr. Ct. 1960).

<sup>224</sup> *E.g.*, *In re Estate of Hobson*, 456 A.2d 800, 802 (Del. Ch. 1982); *Trustees Unitarian Soc'y v. Tufts*, 23 N.E. 1006, 1007 (Mass. 1890) (Holmes, J.); *Douglas v. Newell*, 719 P.2d 971, 976 (Wyo. 1986); MODEL PROBATE CODE, *supra* note 5, at 20–21; MCGOVERN ET AL., *supra* note 8, § 10.1, at 397–98; Gregory S. Alexander, *Ademption and the Domain of Formality in Wills Law*, 55 ALB. L. REV. 1067, 1068–69, 1089 (1992); Fratcher, *supra* note 71, at 1086–87; Mary Kay Lundwall, *The Case Against the Ademption by Extinction Rule: A Proposal for Reform*, 29 GONZ. L. REV. 105 (1993/94); Mechem, *supra* note 38, at 514–17; Page, *supra* note 222, at 26, 28, 38; John C. Paulus, *Ademption by Extinction: Smiting Lord Thurlow's Ghost*, 2 TEX. TECH. L. REV. 195 (1971). *But cf.* Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639, 643–45 (1993) (suggesting that the identity theory is likely to reflect the wishes of testators whose wills have been professionally drafted and which accordingly avoid use of specific bequests to transmit pecuniary value to beneficiaries). In implicit agreement with criticisms of the identity theory, some courts have avoided its strict application by recourse to a variety of legal fictions. *See* DUKEMINIER & JOHANSON, *supra* note 142, at 466–67; 6 PAGE, *supra* note 11, § 54.19; WAGGONER ET AL., *supra* note 88, at 319–22; Bruce L. Stout, *Ademption: Cracks in the Identity Theory Provide Opportunities*, 10 PROB. & PROP., May–June 1996, at 38. Other courts, refusing out of principle to arrogate such devices, have fairly writhed in agony:

Except for the ingenuity of an Appellate Court, not bound by prior determinations, to grant relief by making new decisional law, it would appear that only legislative action can provide needed redress. This court has exhausted every avenue it could think of without success. Reluctantly, it holds the . . . property . . . has adeemed.

*In re Estate of Harris*, 414 N.Y.S.2d 835, 838–39 (Surr. Ct. 1979).

original Uniform Probate Code went ahead and codified the identity theory, along with its exceptions, without substantive comment.<sup>225</sup> As revised in 1990, the Uniform Probate Code abandons the identity theory, replacing it with a rebuttable presumption of intent not to adeem, on the assumption that this approach is more likely to accord with the testator's wishes.<sup>226</sup> Thus, ademption principles posited by the Code are once again conceptually harmonious with those of lapse<sup>227</sup> (although at a technical level they leave a bit too much to the imagination<sup>228</sup>). Perhaps under the Code's influence, the

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<sup>225</sup> See UNIF. PROBATE CODE, *supra* note 5, app. VII, § 2-608 & cmt. (pre-1990 art. 2); *cf. id.* app. VII, § 2-605 & cmt. (pre-1990 art. 2) (setting out an intent-focused provision on lapse). For some technical criticisms of these provisions, today codified in many jurisdictions, see MCGOVERN ET AL., *supra* note 8, § 10.1, at 402-03; Richard W. Effland, *Will Construction Under the Uniform Probate Code*, 63 OR. L. REV. 337, 349-54, 358-63 (1984). Whereas the Model Probate Code included a provision on lapse, its drafters preferred to leave the general issue of ademption to judicial development. See MODEL PROBATE CODE, *supra* note 5, at 20-21, §§ 57, 231.

<sup>226</sup> See UNIF. PROBATE CODE, *supra* note 5, § 2-606(a)(6) & cmt. In this respect, the revised Uniform Probate Code follows the result reached in a small minority of modern cases rejecting the identity theory. *E.g.*, *Estate of Austin*, 169 Cal. Rptr. 648, 652 (Ct. App. 1980) ("In absence of proof of an intent that the gift fail, there should be no ademption."); *McIntyre v. Kilbourn*, 885 S.W.2d 54, 56 (Mo. Ct. App. 1994). Somewhat incongruously, the Code's revised section on ademption still retains the traditional exceptions carved out of the identity theory that the Code has now jettisoned, although these are arguably subsumed within the new clause. See UNIF. PROBATE CODE, *supra* note 5, § 2-606(a)(1)-(3), (b).

<sup>227</sup> One minor theoretical disparity between ademption and lapse does remain. Under the Uniform Probate Code, all rules of construction create mere rebuttable presumptions and extrinsic evidence to rebut them is admissible. See UNIF. PROBATE CODE, *supra* note 5, § 2-601 & cmt. Whereas the presumptions created under the lapse provision are supposed to be rebuttable only by "persuasive evidence," the analogous provision inferring an intent not to adeem creates instead "a mild presumption." Compare *id.* § 2-603 cmt. with *id.* § 2-606 cmt. The reasons for this disparity are nowhere discussed or explained. And compare with the general rebuttable presumption of the Code's rules of construction under § 2-601 the requirement of "clear and convincing evidence" (a standard different from "persuasive"?) applicable to extrinsic proof of an improperly formalized will under the Code. See *id.* § 2-503 & cmt.; see also *id.* § 2-507(b)-(d). Once again, the Code's commentary nowhere addresses comparatively the standards for extrinsic proof of intent to make a will and extrinsic proof of its intended substantive contents. See also *supra* note 59.

<sup>228</sup> All rules of construction under the Uniform Probate Code yield to "a finding of a contrary intention," which can be established by extrinsic evidence. See UNIF. PROBATE CODE, *supra* note 5, § 2-601 & cmt. In addition, the Code spells out that the general presumption against intent to adeem applies "unless the facts and circumstances indicate that ademption of the devise was intended by the testator." *Id.* § 2-606(a)(6). Several matters remain unclear: (1) Is extrinsic evidence admissible (a) only to show the testator's intent at the time the will was executed, or (b) to show her intent at the time the conversion of the

identity theory will fade away at last.<sup>229</sup> Yet what remains striking is the

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property occurred, or (c) to show her intent at any time prior to her death? The comment accompanying the provision suggests that testamentary intent at the time of the conversion is relevant, but the matter needs to be clarified. *See id.* § 2-606 cmt. (2) Do the same rules respecting the time of a legally significant intention to adeem or not under § 2-606(a)(6) also apply to intentions that a bequest lapse or not under § 2-601? (3) Are the testator's *declarations* of intent admissible as a "fact or circumstance" under § 2-606(a)(6) and/or to support a "finding of . . . intention" under § 2-601? *Cf. MCGOVERN ET AL., supra* note 8, § 6.1, at 239-41 (noting the refusal by many courts to admit extrinsic evidence of declarations, as opposed to factual circumstances, to clarify will ambiguities). These uncertainties are bound to sow a measure of confusion in states adopting the revised Code—and hence could reap a harvest of litigation. (Indeed, quite apart from the uncertainties surrounding the rules of admissibility of extrinsic evidence to clarify time ambiguities, the Commissioners' fundamental decision to admit extrinsic evidence *at all* in such cases has the downside, already identified in connection with will formalization and word ambiguities, of tending to foment evidentiary disputes and litigation. For an early observation of the danger in connection with ademption, see *Humphreys v. Humphreys*, 30 Eng. Rep. 85, 85 (Ch. 1789) (Thurlow, C.).) For commentary on the provisions governing lapse and ademption in the revised Uniform Probate Code, see generally Alexander, *supra* note 224; Ascher, *supra* note 224, at 643-57; Averill, *supra* note 117, at 919-25; Martin D. Begleiter, *Article II of the Uniform Probate Code and the Malpractice Revolution*, 59 TENN. L. REV. 101, 120-23, 126-30 (1991); Mary Louise Fellows, *Traveling the Road of Probate Reform: Finding the Way to Your Will*, 77 MINN. L. REV. 659, 663-80 (1993); Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091 (1992); Erich Tucker Kimbrough, Note, *Lapsing of Testamentary Gifts, Antilapse Statutes, and the Expansion of Uniform Probate Code Antilapse Protection*, 36 WM. & MARY L. REV. 269 (1994); Mann, *supra* note 33, at 1053-57.

<sup>229</sup> The disintegration of a perverse rule through an initial stage in which it becomes riddled with (often logically inconsistent) exceptions and then eventually is overruled has frequently occurred in the common law. *See* MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 70-74, 105-118 (1988). For another possible example of this phenomenon within inheritance law, see *supra* notes 139-42 and accompanying text. In setting modern ademption policy, however, one further refinement may merit consideration. Just as modern principles of lapse, as reflected in the Uniform Probate Code, distinguish between different *sorts* of predeceasing beneficiaries, presuming an intent to preserve bequests for the progeny only of close relatives, so perhaps should principles of ademption distinguish between different sorts of "predeceasing" property. Where the property at issue is an heirloom or other unique good peculiarly appropriate to the beneficiary, it may be reasonable to make a rebuttable presumption that the bequest of the item arises chiefly out of sentiment, which will vanish if the item fails to outlast the testator. On the other hand, where the bequest is of an item whose principal attribute is pecuniary value, such as a bond or a security, the likelihood is far greater that the testator would wish the beneficiary to receive a substitute gift if it is sold or called. Such a distinction (though presenting obvious

coequal failure of courts and Commissioners to *relate* ademption to lapse in the course of whittling away at ademption's theoretical foundation.<sup>230</sup> The comments accompanying the revised Uniform Probate Code's provisions on lapse and ademption are both fairly detailed, but at no point does either refer to the other.<sup>231</sup> The flimsiness of the old foundation for ademption principles was plain to see; it has escaped no one's attention. On the other hand, as in so many of the other instances addressed in this Article, the relation of that foundation to other, adjoining ones has eluded the eyes of practically everybody.<sup>232</sup>

#### IV. WHY CONSISTENCY?

I could go on and on, but we need not extend indefinitely our bill of particulars.<sup>233</sup> That inheritance law is replete with structural inconsistencies I

problems of definition and burdens of sorting) is suggested in Mechem, *supra* note 219, at 550-53, 576; Mechem, *supra* note 38, at 515-16; Comment, *The Ademption of Legacies of Stocks and Bonds*, 41 YALE L.J. 101, 107-09 (1931). *But cf.* Note, *Ademption and the Testator's Intent*, 74 HARV. L. REV. 741, 747-48 (1961) (noting that a bequest may be inspired both by sentiment *and* by a desire to transmit value). *Cf.* KY. REV. STAT. ANN. § 394.360 (Michie 1984) (distinguishing presumptions of intent to adeem on the basis of the testator's relationship to the beneficiary).

<sup>230</sup> This has been true even in cases raising both problems simultaneously. *See supra* note 223.

<sup>231</sup> *See* UNIF. PROBATE CODE, *supra* note 5, § 2-603 cmt., § 2-606 cmt. As a consequence, the minor disparity between the strength of the presumptions created under these sections of the Code is nowhere remarked and justified. *See supra* note 227.

<sup>232</sup> Several commentators have drawn the analogy, however. *See* 3 AMERICAN LAW OF PROPERTY § 14.13, at 614 (A. James Casner ed., 1952) ("a somewhat parallel situation"); ATKINSON, *supra* note 30, § 134, at 748 (parallel legislation "deserves careful consideration"); Fellows, *supra* note 228, at 674 ("many parallels"); Mechem, *supra* note 229, at 553 n.10 ("some analogy"); Mechem, *supra* note 38, at 514-17 ("[q]uite similar").

<sup>233</sup> For some additional asymmetries within the law of disclaimer of inheritances, see Hirsch, *Insolvent Heir*, *supra* note 63, at 591-92, 596 & n.49, 640-51. For an asymmetry created in some jurisdictions (and replicated in the Uniform Probate Code) between restrictions on no-contest clauses and enforcement of family settlement agreements, see Martin D. Begleiter, *Anti-Contest Clauses: When You Care Enough to Send the Final Threat*, 26 ARIZ. ST. L.J. 629, 640-44 (1994). Compare UNIF. PROBATE CODE, *supra* note 5, §§ 2-517, 3-905 with *id.* § 3-912. Noting unexplained inconsistencies between different survivorship provisions under the Uniform Probate Code, see Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 MICH. L. REV. 148, 148-49 & nn.4-5 (1995). Discussing an asymmetry between copyright law and inheritance theory, see Francis M. Nevins, Jr., *The Magic Kingdom of Will-Bumping: Where Estates Law and Copyright Law Collide*, 35 J. COPYRIGHT SOC'Y 77 (1988). Suggesting an inconsistency between protection of dependents and creditors' rights under inheritance law, see Paul G.

hope already to have demonstrated to the reader's satisfaction. And at the risk of edging out onto a limb, I dare say that inheritance law is far from exceptional in this respect. Aspects of inconsistency can be found, and probably abound, within and between plenty of other legal categories as well—including trust law,<sup>234</sup> future interests law,<sup>235</sup> and, further afield, bankruptcy law,<sup>236</sup> commercial law,<sup>237</sup> contract law,<sup>238</sup> tort law,<sup>239</sup> criminal law,<sup>240</sup> and

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Haskell, *The Power of Disinheritance: Proposal for Reform*, 52 GEO. L.J. 499, 508–11 (1964).

<sup>234</sup> Discussing asymmetries between the law of trusts and powers, see George E. Palmer, *The Effect of Indefiniteness on the Validity of Trusts and Powers of Appointment*, 10 UCLA L. REV. 241 (1963); see also Patrick Parkinson, *Chaos in the Law of Trusts*, 13 SYDNEY L. REV. 227 (1991) (book review, discussing Commonwealth law).

<sup>235</sup> E.g., LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 70–71 (1955); Daniel M. Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?* (pts. 1 & 2), 56 MICH. L. REV. 683, 887 (1958) (see especially 687–88, 702–04). Compare UNIF. PROBATE CODE, *supra* note 5, § 2-901(a) (permitting private trusts to persist for 90 years) with *id.* § 2-907(a) (recommending that honorary trusts be effective for 21 years).

<sup>236</sup> E.g., compare 11 U.S.C. § 303(b)(1) (1994), construed in *Paradise Hotel Corp. v. Bank of Nova Scotia*, 842 F.2d 47 (3d Cir. 1988) (allowing fully secured creditors to join in an involuntary petition for bankruptcy) with 11 U.S.C. § 702(a)(1) (1994) (denying fully secured creditors the right to vote in an election for the bankruptcy trustee); and compare 11 U.S.C. § 365(c)(1)(A) (1994) (denying the trustee in bankruptcy power to assume or to assign an executory contract that would be unassignable at state law) with 11 U.S.C. § 365(f)(1) (1994) (granting the trustee power to assume and to assign an executory contract notwithstanding a term in the contract rendering it unassignable); and compare 11 U.S.C. § 547(c)(5) (1994) (determining trustee's power to avoid floating liens in bankruptcy) with 11 U.S.C. § 553 (1994) (determining trustee's power to avoid structurally analogous rights of setoff in bankruptcy); and compare 11 U.S.C. § 524(c)-(d) (1994) (setting out complex restrictions on debtor's power to reaffirm specific debts in bankruptcy) with 11 U.S.C. § 727(a)(10) (1994) (setting out minimal restrictions on debtor's power to reaffirm all debts at once in bankruptcy). Discussing several other structural inconsistencies within the Bankruptcy Code, see Hirsch, *Inheritance and Bankruptcy*, *supra* note 63, at 193–96, 240–42. Discussing structural inconsistencies between bankruptcy law and inheritance law, see *id.* at 235–48; Donald L. Swanson, *Bankruptcy—Probate . . . and the Twain Shall Meet*, 20 CREIGHTON L. REV. 435 (1987); and between bankruptcy law and banking law, see John R. Ashmead, *In re Colonial Realty Co.: The Second Circuit Harmonizes Bankruptcy and Bank Insolvency Law (Rejecting Established Bankruptcy Case Law in the Process)*, 60 BROOK. L. REV. 517 (1994); and between bankruptcy law and commercial law, compare 11 U.S.C. § 546(c) (1994) (setting out the right of reclamation in bankruptcy) with U.C.C. § 2-702(2) (1991) (setting out the right of reclamation at state law).

<sup>237</sup> E.g., compare U.C.C. § 9-301(2) (1994) (giving purchase-money creditors a ten-day grace period to perfect a security interest in any sort of property vis-à-vis competing judicial lien gap creditors) with *id.* § 9-312 (giving purchase-money creditors an equivalent ten-day grace period to perfect a security interest only in non-inventory vis-à-vis competing



tax law.<sup>241</sup> The examples, indeed, can be multiplied without end. Roam where you please: there is a surfeit of inconsistency to be discovered.

This assertion of empirics raises a larger question of theoretics. So we have happened upon disharmonies between the application of different laws, what matter? These are, after all, *independent* rules; we can scarcely wonder that they operate in different ways. Let's step back for a moment and consider the import of all of this from the perspective of jurisprudence. Have I, in the foregoing pages, been brewing up a batch of trouble, or merely a tempest in a tea kettle? Why, if at all, is structural consistency of law something devoutly to be wished?

The strong form of the argument for structural consistency is that it is necessary to preserve the legitimacy or, to use Ronald Dworkin's term, the "integrity" of law. "Checkerboard" lawmaking, as Dworkin puts it, applying one legal principle to one problem and a different legal principle to another analogous problem, would, says he, throw the law into disrepute. For Dworkin, fidelity to a single, coherent blend of principles that we proceed to spread evenly over the legal landscape is what *defines* our community, interlinking the fate of its members and setting them apart from others. Structural consistency of law therefore becomes a jurisprudential end in itself, cherished for its own sake.<sup>242</sup> Without it, Dworkin contends, we sacrifice our

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consensual lien gap creditors). Discussing other inconsistencies within commercial law, see Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057, 1078-81 (1954); Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605, 628 (1981) [hereinafter, Gilmore, *Confessions*]; Thomas H. Jackson & Ellen A. Peters, *Quest for Uncertainty: A Proposal for Flexible Resolution of Inherent Conflicts Between Article 2 and Article 9 of the Uniform Commercial Code*, 87 YALE L.J. 907 (1978).

<sup>238</sup> E.g., JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 9-26(b) (3d ed. 1987) (discussing the law of mistakes as to kind versus mistakes as to quality).

<sup>239</sup> Addressing inconsistencies between tort law and contract law, see Thomas C. Galligan, Jr., *Contortions Along the Boundary Between Contracts and Torts*, 69 TUL. L. REV. 457 (1994). Discussing an inconsistency between tort law and property law, see David Cohen & Allan C. Hutchinson, *Of Persons and Property: The Politics of Legal Taxonomy*, 13 DALHOUSIE L.J. 20, 29-53 (1990).

<sup>240</sup> Discussing an inconsistency within criminal law, see Kevin R. Reitz, *Clients, Lawyers and the Fifth Amendment: The Need for a Projected Privilege*, 41 DUKE L.J. 572 (1991).

<sup>241</sup> E.g., compare I.R.C. § 61(a) (1994) & Tres. Reg. § 1.61-1(a) (1960) (payments in kind can constitute income) with I.R.C. § 71(b)(1) (1994) (payments in kind cannot constitute alimony). See generally Reed H. Shuldiner, *Consistency and the Taxation of Financial Products*, 70 TAXES 781 (1992); Reed H. Shuldiner, *Symmetry and Consistency in the Tax Law* (1993) (unpublished paper, on file with author).

<sup>242</sup> Dworkin is hardly the first thinker to take this view, though he does appear to be

sense of political fraternity, and the state forfeits its claim to a monopoly on coercive power.<sup>243</sup>

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the first to weave it into a broader political theory. A long line of prior scholars also exalted structural consistency as an aspect of the geometric elegance of law. *E.g.*, DAVID HOFFMAN, A COURSE OF LEGAL STUDY at xviii–xix (Baltimore, Coale & Maxwell 1817) (observing that the common law “has [n]ever been digested by authority which had the power to lop its excrescences, and reduce it to symmetry,” and therefore is “wanting somewhat in unity and regularity”); HUGH SWINTON LEGARÉ, *Kent’s Commentaries*, in 2 WRITINGS OF HUGH SWINTON LEGARÉ 102, 110–12 (Charleston 1845) (criticizing the “very inelegant and unphilosophic” common law as “a mass of irregularities and incoherencies, which consists . . . in particular usages and occasional decisions”). Blackstone also shared this concern. *See infra* note 280; *cf.* OLIVER WENDELL HOLMES, THE COMMON LAW 1, 36 (Little, Brown 1948) (1881) (downplaying this concern). Generally on this strain of jurisprudence, see M.H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95 (1986); Peter Stein, *Elegance in Law*, 77 L.Q. REV. 242 (1961). Professor Raz also places value in structural consistency of law, for reasons which he never clearly articulates. Raz asserts that where two rules “pursu[e] different and inconsistent social goals” they “cannot coexist,” but surely he does not mean this literally: as this Article has demonstrated, many inconsistent rules have coexisted for centuries. *See* JOSEPH RAZ, THE AUTHORITY OF LAW 200–206 (1979) (quotations at 201). Like Dworkin, Professor Eisenberg views structural consistency (which he terms “systemic consistency”) as contributing to “the legitimacy of the law by demonstrating its formal rationality.” EISENBERG, *supra* note 229, at 44. Unlike Dworkin, Eisenberg is untroubled normatively by a progression toward consistency via intermediate stages in which exceptions inconsistent with a structurally inconsistent rule are carved out of the inconsistent rule before it is overruled outright. *See id.* at 136–40. And, in the vein of Professor Raz, Eisenberg also suggests that structural inconsistencies tend to disappear over time, an assertion called into question by the instant study. *See id.* at 45–46, 71, 74, 117–18. Compare Justice Holmes’s organic vision of the common law, developing transient inconsistencies while it evolves, one doctrine at a time, in response to changing social needs. The common law “will become entirely consistent only when it ceases to grow.” HOLMES, *supra*, at 36. *See also* Robert Nozick’s more general philosophical endorsement of consistent adherence to principles: “Through them, one’s actions and one’s life may have greater coherence, greater organic unity. That may be valuable in itself.” ROBERT NOZICK, THE NATURE OF RATIONALITY 13 (1993).

<sup>243</sup> The argument is developed at length in RONALD DWORKIN, LAW’S EMPIRE 164–224 (1986) [hereinafter DWORKIN, LAW’S EMPIRE]. For Dworkin’s previous, briefer discussion of this idea, see RONALD DWORKIN, *Hard Cases*, in TAKING RIGHTS SERIOUSLY 81, 87–88 (1977) [hereinafter DWORKIN, *Hard Cases*]. Dworkin asserts that the sort of inconsistency with which he is concerned is inconsistency of “principle,” not inconsistency of “policy.” DWORKIN, LAW’S EMPIRE, *supra*, at 221–23. It is none too clear what Dworkin means by this distinction: In an earlier essay, he defined a policy as “a goal to be reached, generally an improvement in some economic, political, or social feature of the community,” whereas a principle is “a standard . . . to be observed, not because it will advance . . . an

Assuming Dworkin is correct in inferring a popular preference for a structurally consistent body of law, as a defining characteristic of our political community,<sup>244</sup> his analysis fails to consider that structural inconsistencies are often difficult to spot. It is one thing for a legal system to oscillate between alternative formulations of the *same* legal rule (temporal, as opposed to structural, inconsistency<sup>245</sup>). If citizens cannot anticipate which principle will be applied on any given day of the week and hence cannot predict the legal ramifications of the decisions they make, then they lose their capacity rationally to plan their affairs. This defect in the system will be readily apparent and immediately felt.<sup>246</sup> But when our game is the checkerboard instead of the seesaw, that difficulty fails to arise. Here, it requires a roving eye to notice failures to deal with different-but-analogous problems in a harmonious way. Many of the inconsistencies examined in this Article have escaped detection up to now, even by experts in the field.<sup>247</sup> The peripheral vision of lay persons is

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economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality." RONALD DWORKIN, *The Model of Rules I*, in *TAKING RIGHTS SERIOUSLY* 14, 22-23 (1977); see also DWORKIN, *Hard Cases*, *supra*, at 90-91. Yet in his discussion of legal inconsistency, Dworkin offers as an example of inconsistency of principle the application of strict products liability to some products but not to others; some three pages on, he offers as an example of inconsistency of policy the application of farm subsidies to some crops but not to others, for which discriminations "there might be sound reasons of policy." DWORKIN, *LAW'S EMPIRE*, *supra*, at 217-18, 221-22; see also *id.* at 178. From this, I gather that what Dworkin here intends by an inconsistency of "principle" is simply an inconsistency stemming from an *arbitrary* application of alternative policies, that is, a disparity that cannot be justified by some singular, rational, policy formulation. Dworkin makes clear that he has no quarrel with discordant rules where the disharmony follows from valid policy considerations. See *id.* at 179 & n.6.

<sup>244</sup> There are of course any number of alternative political conceptions of community, many of which are not incompatible with checkerboard lawmaking. Dworkin himself details several of these alternatives. See DWORKIN, *LAW'S EMPIRE*, *supra* note 243, at 190-215.

<sup>245</sup> Dworkin prefers a spatial terminology, distinguishing "horizontal consistency" from "vertical consistency." DWORKIN, *LAW'S EMPIRE*, *supra* note 243, at 227.

<sup>246</sup> Judges, at least, have sensed the sensitivity of the public to temporal consistency with respect to individual legal issues: "There should be some measure of uniformity in [personal injury] awards so that similar decisions are given in similar cases; otherwise there will be great dissatisfaction in the community and much criticism of the administration of justice." *Ward v. James*, 1 All E.R. 563, 574 (C.A. 1965) (Denning, M.R.). "It is almost as important that the law should be settled permanently, as that it should be settled correctly. . . . Vacillation is a serious evil." *Gilman v. Philadelphia*, 70 U.S. 713, 724 (1865) (Swayne, J.).

<sup>247</sup> See, e.g., *supra* note 91 and accompanying text. But cf. Dworkin: "[C]heckerboard statutes are a flagrant and easily avoidable violation of integrity. . . ."

doubtless far blurrier; the low salience even of individual legal rules among the laity has been demonstrated empirically.<sup>248</sup>

In short, the political repercussions of structural inconsistencies in law are likely to be few. Among ordinary citizens, checkerboard jurisprudence is too obscure to raise eyebrows or to diminish in any palpable way our sense of belonging to a community.<sup>249</sup> Only those possessed of professional legal training are equipped to discern structural inconsistencies within their subject matter. If as a result *lawyers* feel alienated from the larger political community, the popular response will probably be, *good riddance!*

To the extent, then, that disquiet over legal inconsistency is confined to the legal community, without infecting the larger body politic, the aim to correct it may degenerate into an aesthetic ideal, an appeal for *elegantia juris*.<sup>250</sup> But even here, the point is not unequivocal. There are, after all, some aesthetes who prefer the crazy-quilt to the monotony of consistent patterns.<sup>251</sup>

On further reflection, however, one can conjecture other, substantive arguments to make on behalf of structural consistency. In those instances where inconsistencies distinguish the rights of different groups within society, political discontent is likely to well forth. This peculiarly invidious sort of inconsistency has, of course, been the object of constitutional proscription.<sup>252</sup> At least within

DWORKIN, *LAW'S EMPIRE*, *supra* note 243, at 217.

<sup>248</sup> See Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 408-09.

<sup>249</sup> The very fact that structural inconsistencies have been left undisturbed in our law—often for centuries—without raising so much as a ripple of protest is in itself an empirical confirmation of this conclusion. Of course, this would not preclude Dworkin from proposing integrity as a *moral* ideal in political theory, though it would diminish the practical or pragmatic significance of any such theory. But, at any rate, Dworkin does not claim that his theory has abstract merit in political morality. Rather, Dworkin professes to be developing a descriptive model of prevailing political ideals, premised on *our own* conceptions of what defines our community. That is to say, Dworkin is deriving and articulating ideals that, he asserts, follow from (and “fit”) a conception of community that he takes to be ours. See DWORKIN, *LAW'S EMPIRE*, *supra* note 243, at 216. I have, in the text above, raised doubts about that fit, at least at a practical level. But even Dworkin's descriptive identification of the *ideal* is doubtful. See *infra* note 252.

<sup>250</sup> Dworkin specifically denies that the concern for legal consistency derives merely from a “superstition of elegance.” DWORKIN, *LAW'S EMPIRE*, *supra* note 243, at 167. On Dworkin's superstitious predecessors, see *supra* note 242.

<sup>251</sup> “[T]he delightful emotion of grandeur, depends little on order and regularity; and when the emotion is at its height by a survey of the greatest objects, order and regularity are almost totally disregarded.” LORD KAMES, *ELEMENTS OF CRITICISM* (Edinburgh, 2d ed. 1763), *quoted in* DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 100 (1941).

<sup>252</sup> See U.S. CONST. amend. XIV. Dworkin points to the Equal Protection Clause as evidence of a prevailing (though implicit) political commitment to the ideal of structural

the realm of inheritance law, it has reared its head only rarely.<sup>253</sup> In addition, where structurally inconsistent principles brush up against each other, difficulties can arise. In the non-Euclidean geometry of our legal sphere, parallel lines sometimes intersect. Where the boundaries between mutually inconsistent rules are indistinct, as for instance in the case of the plain meaning rule and the latent or patent ambiguity rule, the result at the point of intersection is uncertainty.<sup>254</sup> Where the boundaries between mutually inconsistent rules are clear-cut, as for instance in the case of laws governing the substantive effect of revocation of *codicils* and of subsequent *wills* by act, the result is a catastrophic discontinuity at the margin.<sup>255</sup>

Yet it is not evident that these juridical *sequelae* are substantively different from, or even more pronounced than, those that would continue to pervade a legal landscape that was developed consistently. To the extent that rules are indistinct, they create uncertainties singlehandedly. A penumbra shimmers around many rules of law; oftentimes, there seems to be more penumbra than law. Likewise, catastrophic discontinuities appear wherever a legal system decides to draw sharp lines, irrespective of whether they happen to intersect.

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consistency in law, a "part of our collective political morality" which, while nowhere expressed in general terms in our hallowed political texts, nonetheless conforms to "our instincts." DWORKIN, *LAW'S EMPIRE*, *supra* note 243, at 182–85, 214–16 (quotations at 182, 184); *see also* EISENBERG, *supra* note 229, at 44 (suggesting that structural consistency promotes "evenhandedness"). Of course, no one can deny that the Equal Protection Clause embodies one of our political ideals, but this covers only a small sub-set of structural inconsistencies. Whether, in fact, everyone would instinctively agree that "[e]ven if I thought strict liability for accidents wrong in principle, I would prefer that manufacturers of both washing machines and automobiles be held to that standard than that only one of them be," is open to question. *Id.* at 182. Dworkin readily admits that violations of the ideal are frequent (*see id.* at 184), a frequency confirmed by the many examples rehearsed in this Article. Once again, this empirical fact calls into question the prevalence of the ideal. Indeed, if Dworkin's identification of structural consistency of law as one of our ideals were accurate, then, given its rampant violation, that ideal would have to be accounted a *political fiction*. Discussing this phenomenon, *see* EDMUND S. MORGAN, *INVENTING THE PEOPLE* 13–15 (1988). At any rate, throwing a dose of cold water on Dworkin's claim that structural consistency is the primary tenet underlying Americans' sense of political community, *see* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1550–53 (1987).

<sup>253</sup> One example has been the treatment of children born out of wedlock under the law of intestate succession. For a brief historical discussion, *see* DUKEMINIER & JOHANSON, *supra* note 142, at 106–07.

<sup>254</sup> *See supra* notes 187–95 and accompanying text.

<sup>255</sup> *See supra* notes 115–17 and accompanying text.

All our actions at the margin are either legal or illegal; they are never a little bit illegal.<sup>256</sup>

At the end of the day, it seems difficult to surmise that structural consistency is a value—the absence of melody is not a malady in and of itself. On the other hand, structural inconsistency can be characterized as a benign symptom, not harmful *per se*, but ominous, often reflecting and divulging the presence of an underlying ailment. For what structural inconsistencies frequently do signal is public policy misapplied. This I would offer as the weak form of the argument for why they are important.

To be sure, there may be sound reason back of seemingly inconsistent legal rules.<sup>257</sup> An analogy ought not to be confused with an identity; for an analogy is not an absolute.<sup>258</sup> It derives rather from the analytic structure we choose to project onto the particular rules that are under comparison. The different problems covered by those rules will be similar in some respects, but never in all respects. Infinitely variable, our analytic structure rests on assumptions about which similarities are significant and which distinctions insignificant, given the nature and scope of the public policies we perceive to apply. Those assumptions may be sketchy, and a superficial structural analogy drawn between discordant rules *may prove false* on closer inspection of the policies that respectively underlie them.<sup>259</sup> In other words, the fault may lie not with

<sup>256</sup> Justice Holmes, as usual, saw the point clearly. See his discussions of catastrophic discontinuities in law in *Schlesinger v. Wisconsin*, 270 U.S. 230, 241 (1925) (Holmes, J., dissenting); *LeRoy Fibre Co. v. Chicago, Milwaukee & St. Paul Ry.*, 232 U.S. 340, 354 (1913) (Holmes, J., partially concurring); Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 456–57 (1899). See also Glanville L. Williams, *Language and the Law*, 61 L.Q. REV. 179, 181–89 (1945).

<sup>257</sup> As architects are wont to say, “an asymmetry is not necessarily an imbalance.” Criticizing the British Wills Act of 1837, Henry Sugden warned against “unnecessarily forming a system . . . whilst the irregularities which time and necessity have introduced may be the very things which do not require reform or alteration.” Sugden, *supra* note 31, at 9, 19. Dworkin readily concurs and has no objection to doctrinal asymmetries when they are justified by public policy. See *supra* note 243. See also EISENBERG, *supra* note 229, at 44–45, 93–94 (suggesting that only where doctrinal asymmetries are not justified by policy considerations should the doctrines be conceived as inconsistent).

<sup>258</sup> Or is it? The question of whether there are *natural* categories, independent of human conceptual activity, has engaged philosophers of knowledge at least since Aristotle. For a recent discussion, see HILARY KORNBLITH, *INDUCTIVE INFERENCE AND ITS NATURAL GROUND: AN ESSAY IN NATURALISTIC EPISTEMOLOGY* (1993).

<sup>259</sup> The philosopher of knowledge, W.V. Quine, described categorization in general as a dynamic process:

[O]ne's system of kinds develops and changes and even turns multiple as one matures . . . . And at length standards of similarity set in which are geared to theoretical

the rules but with the structure developed to reveal symmetries and asymmetries between them. Along the way, we have posited policy distinctions that could serve to justify at least some of the doctrinal disparities explored in this Article.<sup>260</sup> At the same time, as we have also seen, inconsistencies may trace to phantom policies, such as historicism<sup>261</sup> or frivolous distinctions of form.<sup>262</sup> Where that is true, needless to say, inconsistencies can and should be rejected as substantively groundless.

On the other hand, discordant legal rules may be informed by alternative, equally plausible, policy principles.<sup>263</sup> Where that is the case, where lawmakers face a policy dilemma or antinomy, their decision to opt for

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science. This development is a development away from the immediate, subjective, animal sense of similarity to the remoter objectivity of a similarity determined by scientific hypothesis and posits and constructs.

W.V. QUINE, *Natural Kinds*, in *ONTOLOGICAL RELATIVITY AND OTHER ESSAYS* 114, 134 (1969). On the other hand, it remains possible that even on closer inspection, the presence or absence of a structural inconsistency would prove ambiguous if a difference of opinion exists over what public policy underlies a particular rule. See generally Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

<sup>260</sup> See, e.g., *supra* notes 88–91, 219 and accompanying text.

<sup>261</sup> See *supra* notes 43–46, 60 and accompanying text. On historical derivation as a source of legitimation of law, see generally Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651 (1994). For Justice Holmes's classic denunciation of historicism, see Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 468–69 (1897).

<sup>262</sup> See *supra* notes 123–26, 136, 160–65 and accompanying text. In some instances, inconsistencies that in one era made sense have grown frivolous with the passage of time and hence should be looked upon, more precisely, as *anachronisms*: the classic example being the hoary distinctions between realty and personalty that persist within the property laws of many states. See, e.g., *supra* notes 57, 60; Hirsch, *Spendthrift Trusts*, *supra* note 63, at 3 n.8. See also EISENBERG, *supra* note 229, at 45–46, 124–26.

<sup>263</sup> It is this sort of inconsistency to which Dworkin's argument is addressed. The classic policy conflict within inheritance law lies between the principle of freedom of testation on the one hand and the principle of protection of dependents on the other, although this conflict has been resolved by and large through compromise at the relevant points where the tension arises, rather than through alternating implementations. On this problem, see SIMES, *supra* note 235, at 1–31; Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996); see also DWORKIN, *LAW'S EMPIRE*, *supra* note 243, at 435 n.7 (noting the possibility of avoiding inconsistency through compromise). Among the inconsistencies explored in this Article, the one between executed wills (providing certainty of intent) and holographic wills (providing ease of testation) presents the clearest unresolved policy conflict, which lawmakers could again (if they were so minded) settle through compromise. See *supra* notes 47–60 and accompanying text.

consistency versus the checkerboard may, as I have suggested, simply come down to a question of aesthetics (Dworkin's axiom notwithstanding). In such instances, pointing out the inconsistency will often have no political implications beyond highlighting the policy dispute in a particularly vivid way.<sup>264</sup>

Yet there remains a third possibility: namely, that a single, coherent policy dictating one rule is not reflected in another rule to which we can draw an analogy, *simply because it has been overlooked*. For when rules pass as ships in the night and are rarely compared, it is well-nigh inevitable that policies seen to be germane here will, on occasion, slip by us over there.<sup>265</sup> The discovery of a structural inconsistency suggests this possibility.<sup>266</sup> Its identification can aid lawmakers in applying the appropriate policy to *all* legal problems to which it relates.<sup>267</sup> Accordingly, if structural consistency is not something devoutly to

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<sup>264</sup> On the other hand, recognition of such an inconsistency could have constitutional implications, to the extent that discriminate application of alternative policies to different groups is deemed *eo ipso* to be politically illegitimate. See *supra* note 252 and accompanying text.

<sup>265</sup> Not always, of course. The policies themselves are free-floating and can be pointed out by commentators or lawmakers without focusing on, or even noticing, their embodiment within other rules. Some of the criticisms offered in this Article from a comparative perspective have already been made by other commentators, without comparison, at the level of pure policy. See, e.g., *supra* notes 165, 224 and accompanying text.

<sup>266</sup> Concern for structural consistency has often led thinkers in a conservative direction. They have hesitated to innovate with respect to established rules for fear of creating inconsistencies and conflicts with respect to other, analogous rules that they have no immediate authority to change. For a modern discussion, see RAZ, *supra* note 242, at 200-01; see also DWORKIN, *LAW'S EMPIRE*, *supra* note 243, at 218 (remarking the same dilemma in the context of legislation); for references specifically concerning inheritance law, see ARMSTRONG, *supra* note 36, at 99; Hirsch & Wang, *supra* note 63, at 55-56. Such views are premised on the assumption that lawmakers have theretofore been mindful of consistency which, as this Article has endeavored to show, is a doubtful proposition! If, by contrast, we assume that lawmakers have not been so mindful, then concern for structural consistency leads rather in an activist direction. Dworkin recognizes this point at the broader level of antinomies of principle, which are the focus of his interest. See DWORKIN, *LAW'S EMPIRE*, *supra* note 243, at 219-21.

<sup>267</sup> As observed *supra* note 265, comparative analysis is not essential for this purpose, so long as lawmakers take pains to inquire into relevant policies, which can always be explored intrinsically. Still, comparative analysis is quite helpful for this purpose, given that related rules may already reflect, and their formulation may already have been the occasion for articulating, those relevant policies. Comparative analysis thus saves lawmakers from the task of rediscovering policies already developed and followed in other arenas. That this task may not be accomplished otherwise is, I believe, evidenced in the many inconsistencies identified in this Article that have never been satisfactorily justified.



be wished, it is at least something closely to be *watched*.

One of the lessons of this Article is the failure of judicial and legislative vigilance in this regard. Lawmakers simply have not spied many of the inconsistencies that have sprung up over the years and so have never deliberated over whether they are justified as a matter of social utility. This inobservance is an unfortunate, but predictable, byproduct of our legal culture. Judges and legislators alike face issues narrowly, one at a time, case by case. Structurally comparative analysis has been the exception,<sup>268</sup> and so it has become possible, or even probable, for individual doctrines to develop, as it were, in splendid isolation.<sup>269</sup> This tropism for legal cabining must follow in

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<sup>268</sup> This is not, of course, to say that it never occurs. Analytical spores do on occasion drift from one legal category into another. Recognizing the usefulness of analogies, see for example RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 61, § 90 cmt. a; FRANK M. COFFIN, *THE WAYS OF A JUDGE* 105 (1980). For an early example, see Helmholz, *supra* note 43, at 101–02 (noting an analogy of contract formalities to will formalities, made by attorneys in the sixteenth century). For a recent example, see *In re Estate of Palizzi*, 835 P.2d 563, 564 (Colo. Ct. App. 1992) (applying to wills a rule of construction previously limited to real property deeds), *rev'd on other grounds*, 854 P.2d 1256, 1260–61 (Colo. 1993). For some other examples, see Hirsch, *Insolvent Heir*, *supra* note 63, at 605–06. For recent theoretical discussions of analogical reasoning in law, see generally EISENBERG, *supra* note 229, at 83–96; RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 86–98 (1990); RAZ, *supra* note 242, at 201–06; Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996); James R. Murray, *The Role of Analogy in Legal Reasoning*, 29 UCLA L. REV. 833 (1982); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993). Attorneys arguing individual cases obviously have an incentive to offer substantive analogies in order to sway the court; in similar fashion, the early English attorneys prodded the procedure-driven writ system by offering, in effect, *procedural* analogies, seeking to gerrymander the boundaries of the ancient forms of action. The latter story is told in MILSOM, *supra* note 197.

<sup>269</sup> The phenomenon has been recognized, for example, within the field of bankruptcy law: “[T]he problem is the way in which bankruptcy law is perceived as an area separate from the rest of the legal world. In many respects the new bankruptcy [code] inadequately reflects bankruptcy law’s existence as part of a legal structure that includes many other . . . laws . . . .” Theodore Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. REV. 953, 953 (1981); similarly, see THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 279 (1986); William F. Adler, *Some Effects of Chandler Bankruptcy Act on Other Branches of the Law*, 15 U. CIN. L. REV. 429, 429 (1941). And again, in addressing analogous cases separately categorized under tort and property, “what is initially remarkable . . . is that neither Mr. Justice Chouinard in *Lapierre* nor Mr. Justice Estey in *Tener* had an inkling that the cases raised much the same issues and problems. Neither judgment refers to the other. Neither judgment alludes to the need for a common underlying justification . . . .” Cohen & Hutchinson, *supra* note 239, at 33. And again, an aspect of copyright law antithetical to inheritance theory “was created inadvertently, grew

part from deep-seated notions about what it means to judge and to make law. Constructing compartments is an inherent aspect of the process, as we have come to know it. But the tendency to divide and then to subdivide legal doctrines, with attention successively riveted on each individually, also stems almost certainly from the daunting complexity of American law. One of the more subtle consequences of legal complexification has been its tendency to breed compartmentalization, if only to offer a measure of relief to lawmakers and legal scholars with human capacities for absorbing knowledge.<sup>270</sup> The more intricate law becomes, the greater the inducement to home in on the trees, and eventually the leaves, to the exclusion of the forest.<sup>271</sup> Such analytical self-confinement is, of course, an old story in the law<sup>272</sup>—but so are complaints

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haphazardly, . . . and throughout its life remained unknown, as it still is today, . . . to virtually all the [estates] attorneys who must know of it if they are to plan creative persons' estates properly." Nevins, *supra* note 233, at 114 (see also *id.* at 77–78). Noting the phenomenon of ad hoc development as a general aspect of the common law, see DANIEL J. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 41 (1965), and as a general aspect of legislation, see Eskridge, *supra* note 252, at 1551–52; William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1078–79 (1989).

<sup>270</sup> Some of the other costs and benefits of legal complexity are explored in RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 21–49 (1995); Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150 (1995); Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1549–51 (1996); Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977); Edward J. McCaffery, *The Holy Grail of Tax Simplification*, 1990 WIS. L. REV. 1267; Sheldon D. Pollack, *Tax Complexity, Reform, and the Illusions of Tax Simplification*, 2 GEO. MASON INDEP. L. REV. 319 (1994); Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1 (1992).

<sup>271</sup> Or is it (also) the other way around? For the more we narrow our gaze, the greater the clarity of microscopic intricacies of public policy—and hence the impetus to offer a correspondingly intricate legal response. As Grant Gilmore averred, “[t]he path of the law leads not to the revelation of truth but to the progressive discovery of infinite complexity.” Grant Gilmore, *For Arthur Leff*, 91 YALE L.J. 217, 218 (1981); see also McCaffery, *supra* note 270, at 1275–79 (discussing vicious cycles of complexification within one legal category). Raiding the lexicon of mathematical geometry, one observer refers to this phenomenon as the “fractal” nature of legal analysis. See Stephen B. Land, *Strange Loops and Tangled Hierarchies*, 49 TAX L. REV. 53, 123 (1993). For a similar vision of investigations into natural science, see KARL R. POPPER, *The Growth of Scientific Knowledge* (1960), in POPPER SELECTIONS 171, 179–80 (David Miller ed., 1985).

<sup>272</sup> Professor Milsom recounts the development of the writ system in Great Britain: “Upon the infinite details . . . [the serjeants-at-law] concentrated their great abilities; and they never looked up to consider as a whole the substantive system they did not know they were making.” MILSOM, *supra* note 197, at 29–30, 32 (quotation at 32). Not only do legal actors tend to confine themselves to a single category of analysis when dealing with a

about the sprawling lushness of our legal jungle.<sup>273</sup> To some extent, notions of

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particular problem; they also tend to confine themselves over time to the *same* category of analysis, the phenomenon of *specialization*. Courts with specialized (though sometimes overlapping) jurisdictions existed in England from medieval times. See 1 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 526–632 *passim* (7th ed. 1956). These too have been a feature of the American judicial landscape nearly from the beginning. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 141–43 (2d ed. 1985); Mark DeWolfe Howe, *The Sources and Nature of Law in Colonial Massachusetts*, in *LAW AND AUTHORITY IN COLONIAL AMERICA* 1, 6–7 (George Athan Billias ed., 1965). For recent discussions, see Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 B.Y.U. L. REV. 377; Rochelle Cooper Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1 (1995) (and commentaries following). The specialized practice of law was already underway in America in the eighteenth century and was a recognized trend in the nineteenth century. See FRIEDMAN, *supra*, at 310–11; MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 140–41 (1977); PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA* 142–43 (1965). It has been formalized today with the practice of board certification by state bar associations in legal sub-specialties, such as estate planning. Specialized legal treatises first began to appear in England late in the fifteenth century (and have lately been joined in America by the specialized law reviews). See generally Mike Antoline, *The New Law Reviews: A Burst of Specialty Alternatives*, STUDENT LAW., May 1989, at 26; John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 585–93 (1993); A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632 (1981); D.W.M. Waters, *The Role of the Trust Treatise in the 1990s*, 59 MO. L. REV. 121 (1994).

<sup>273</sup> For modern assessments, see *supra* note 270. For popular perceptions, see Jerrold K. Footlick, *Too Much Law?*, NEWSWEEK, Jan. 10, 1977, at 42. Likewise, the revisers of the Uniform Probate Code have added to its complexity, despite the original drafters' call to simplify inheritance law. See *supra* note 5 and accompanying text. Criticizing the revised Code's complexity, see Ascher, *supra* note 224. In fact, complaints about the complexity of law may well be as old as law itself. Certainly, they pealed through the literature of the late nineteenth century, as when one anonymous critic wondered:

[W]hat are we to do with [the law's] vastness? Who can master and understand it, and what is the use of law if common minds cannot find it out by study? Law becomes a delusion and a snare if to know what it authorizes . . . he has got to study a couple of thousand volumes.

*Codes*, 9 ALB. L. REV. 33, 33 (1874). Yet, the same lament could also be heard early in that century, as when Justice Story warned that:

The mass of the law is, to be sure, accumulating with an almost incredible rapidity, and with this accumulation, the labor of students as well as professors, is seriously augmenting. . . . [T]he fearful calamity, which threatens us, [is] of being

lawmaking as the formulation of conceptual compartments (now as then) simply make virtue of epistemological necessity.<sup>274</sup>

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buried alive, not in the catacombs, but in the labyrinths of the law.

Joseph Story, *An Address Delivered Before the Members of the Suffolk Bar*, 1 AM. JURIST 1, 31 (1829). For other early criticisms, see CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* 8, 12–18, 36–39, 51, 55–59, 84, 127, 159–60 (1981); DAVID D. FIELD, *The Codes of New York and Codification in General* (Feb. 6, 1879), in 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 374, 377–78 (A.P. Sprague ed., New York, D. Appleton & Co. 1884) [hereinafter FIELD PAPERS]; 3 KENT, *supra* note 172, at 88 n.b; GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 323 (1992) (quoting Henry Chipman, 1806); Letter from James Kent to Simeon Baldwin (Jan. 18, 1795), *quoted in* Joseph Dorfman, *Chancellor Kent and the Developing American Economy*, 61 COLUM. L. REV. 1290, 1314–15 (1961); and on a paranoid note, see THE KEY OF LIBERTY: THE LIFE AND DEMOCRATIC WRITINGS OF WILLIAM MANNING, “A LABORER,” 1747–1814, at 132–33, 140–41, 146, 180 (Michael Merrill & Sean Wilentz eds., 1993) (ms. 1798–99) (suggesting that lawyers had conspired to complexify law in their own mercenary interest). For British references to legal complexity in the nineteenth century, see 2 AUSTIN, *supra* note 28, at 1092; and in the eighteenth century, see 1 BLACKSTONE, *supra* note 26, at \*10–11; 2 *id.* at \*172; 3 *id.* at \*265–68, \*325–28 (also adverting to the complexity of the continental civil law); 4 *id.* at \*417–18 (blaming the Normans), \*443; and in the seventeenth century, see DONALD VEALL, *THE POPULAR MOVEMENT FOR LAW REFORM, 1640–1660*, at 69–70, 97 *passim* (1970) (quoting Francis Bacon and John Warr). But see Holmes, *supra* note 261, at 458, averring that:

It is a great mistake to be frightened by the ever increasing number of reports. The reports . . . in the course of a generation take up pretty much the whole body of the law, and restate it from the present point of view. We could reconstruct the corpus from them if all that went before were burned.

<sup>274</sup> Generally on the psychology and epistemology of categorization, see W.K. ESTES, *CLASSIFICATION AND COGNITION* (1994). For an early discussion, see IMMANUEL KANT, *CRITIQUE OF PURE REASON* 100–06 (J.M.D. Meiklejohn trans., Prometheus Books 1990) (1781). Some researchers assert that the cognitive tendency to categorize is innate:

[O]rganisms . . . not only appear to have perceptual categories, but . . . [may] also display a sophisticated system of subcategories . . . . It is most likely that at least the subcategory system, if not the categories as well, are acquired through experience and not hard-wired. Both categorizing and subcategorizing are adaptive to highly social, actively communicating animals, human and nonhuman.

Charles T. Snowdon, *A Naturalistic View of Categorical Perception*, in *CATEGORICAL PERCEPTION* 332, 352 (Stevan Harnad ed., 1987).

Indeed, this phenomenon, together with its systemic radiations, has come to be an accepted aspect of human cognition in general. Whenever we face highly complex decisions (of which lawmaking is but one of a myriad of examples), human persons often resort to heuristic devices serving to simplify the analytical challenge that those decisions pose. The choices that follow from these simplified processes of reasoning are rarely optimal, but they are usually good enough, enabling us to get by. Though not always rational, then, in the sense of being perfectly thought out, these decisions reflect an efficient use of our scarce cognitive resources, and so represent exercises in "bounded rationality."<sup>275</sup>

Of the many analytical short-cuts to which human persons have recourse, one is simply the tendency to contemplate problems locally, without comprehensive enquiry into their global interconnections. This sort of reductionism renders the problem at hand far more tractable, often without substantially degrading the decision's quality. But, as cognitive theorists predict, "particular decision domains will evoke particular values, and *great inconsistencies in choice may result from fluctuating attention.*"<sup>276</sup> It is

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<sup>275</sup> The concept has been developed over the course of a career in the work of Nobel laureate Herbert Simon (who also coined the term). See his pioneering essay, Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955), reprinted in 2 HERBERT A. SIMON, *MODELS OF BOUNDED RATIONALITY* 239 (1982) [hereinafter SIMON, *MODELS*]. For a recapitulation, see HERBERT A. SIMON, *REASON IN HUMAN AFFAIRS* (1983) [hereinafter SIMON, *REASON*]. Discussing heuristic processes generally, see JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982). Of course, Simon's model diverges from the assumption of perfect rationality still employed and defended by mainstream economists, whose works have also been laureated. See Gary S. Becker, *Nobel Lecture: The Economic Way of Looking at Behavior*, 101 J. POL. ECON. 385, 402 (1993).

<sup>276</sup> SIMON, *REASON*, *supra* note 275, at 17-23 (quotation at 18) (emphasis added); see also Herbert A. Simon, *The Bottleneck of Attention: Connecting Thought with Motivation*, in 41 NEB. SYMP. ON MOTIVATION: INTEGRATIVE VIEWS OF MOTIVATION, COGNITION, AND EMOTION 1, 4-8 (William D. Spaulding ed., 1994) (discussing the efficiency of serial, as opposed to parallel, problem solving). This tendency toward localized analysis may be related to the "anchoring" heuristic, whereby persons asked to estimate probabilities tend, in somewhat similar fashion, to focus on an initial factor in making the calculation and fail to adjust sufficiently to take account of other ones. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1128-30 (1974), reprinted in JUDGMENT UNDER UNCERTAINTY, *supra* note 275, at 3.

Another, related method of analytical simplification often employed by decision makers is what Professor Simon (dipping back to the old Scotch lexicon) dubs *satisficing*: "using experience to construct an expectation of how good a solution we might reasonably achieve, and halting search as soon as a solution is reached that meets the expectation." Herbert A. Simon, *Invariants of Human Behavior*, 41 ANN. REV. PSYCHOL. 1, 9 (1990). As Professor

precisely this phenomenon of localized analysis, with attendant structural inconsistency, that inheritance law so manifestly evidences.<sup>277</sup> Legal scholars of late have taken notice of the intellectual frailties of human actors and have applied the insights of cognitive science to substantive questions of legal policy.<sup>278</sup> The time has come to recognize the jurisprudential significance of our cognitive limitations as well: Bounded rationality profoundly affects *the*

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Simon observes,

[p]icking the first satisfactory alternative solves the problem of making a choice whenever . . . an enormous, or even potentially infinite, number of alternatives are to be compared . . . . Satisficing also solves the common problem of making choices when alternatives are incommensurable, either because (a) they have numerous dimensions of value that cannot be compared, (b) they have uncertain outcomes that may be more or less favorable or unfavorable, or (c) they affect the values of more than one person.

*Id.* at 9–10. Plainly, all of these factors are present in the context of lawmaking, and so we may anticipate that lawmakers will satisfice when they craft legal rules. That satisficing can also result in inconsistency of choice is obvious. *See* Simon, *supra* note 275, at 110–11 (noting that when decision makers satisfice, the sequence of their search for alternatives, and hence their ultimate choice, may be impossible to anticipate).

<sup>277</sup> Localized analysis is not the only reflection of bounded rationality evident in the process of lawmaking. Another heuristic specific to courts is the effort-reducing doctrine of precedent. *See infra* note 303. Still another heuristic—the *ne plus ultra* of heuristics, in fact—often employed by courts is encouragement of the litigants to shift to alternative dispute resolution, to settle, or (in criminal cases) to plea bargain, along with the simple refusal to try cases, either in whole (denial of review, etc.) or in part (resolving cases without reaching all of the issues presented, etc.). Courts thereby relieve the cognitive strain of complex decision-making by relieving themselves of responsibility for making any decision at all! History reveals a long tradition of such expedients in the common law. For some early variants, see J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 4–6 (2d ed. 1979) (discussing early encouragement of settlement and judicial decision through supernatural oracles). Perhaps we should dub this the *abstention heuristic*. It is employed often enough in lay decision-making as well (“Honey, you decide!”). Recognizing the phenomenon, but tracing it to a different psychological source, see Richard H. Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 51–54 (1980), reprinted in RICHARD H. THALER, QUASI RATIONAL ECONOMICS 3 (1991).

Dworkin acknowledges the cognitive limitations of judges implicitly—or rather eponymously—by calling his ideal judge “Hercules.” *See* DWORKIN, LAW’S EMPIRE, *supra* note 243, at 264–66; DWORKIN, *Hard Cases*, *supra* note 243, at 105, 130.

<sup>278</sup> Myself among them. *See* Hirsch, *Spendthrift Trusts*, *supra* note 63. For another recent contribution to this growing literature, see Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995); see also LoPucki, *supra* note 270 (addressing the dichotomy between law-in-books and law-in-action from the perspective of cognitive theory).

*process of lawmaking itself.*<sup>279</sup>

One might therefore be tempted, on reflection, to take a philosophical attitude toward all of this. Call it a fact of legal life, and then call it a day. If lawmakers are subject to natural constraints, a microscopic approach may, once again, bring efficiently to bear their modest intellectual powers. In this sense, structurally inconsistent law would still be teleologically sound, allowing governors—and the governed—if not to make strides, then at least to make do.

But in truth, our predicament need not be cast in such fatalistic terms. Over the ages, surely, some jurists have managed to take a large view of their

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<sup>279</sup> The fallibility of human reason is in fact an ancient theme in the philosophy of the psyche. See Hirsch, *Spendthrift Trusts*, *supra* note 63, at 18–19. That this fallibility could tarnish the process of lawmaking was also recognized early. For the seventeenth-century Puritans, it became an argument for preferring the laws of God over human legal innovations. As the Reverend John Cotton put it, “[t]he more any Law smells of man the more unprofitable.” GEORGE LEE HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS* 141–62 (1968) (quotation at 160). For some eighteenth-century Englishmen, the fallibility of reason became instead an argument for preferring the common law over statutes. Though both were the products of men, still the common law was derived from natural law and had been gradually cleansed of its human errors by the scourings of judicial reconsideration over the course of the ages. See BOORSTIN, *supra* note 251, at 25–30; DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN* 43–47, 56–67 (1989). In the nineteenth century, Jeremy Bentham remarked the “indolence or shortsightedness of the Legislator” whose rule was “[n]ever to look further than your nose” as a ground for placing lawmaking in the hands of an ingenious, far-sighted codifier. See LIEBERMAN, *supra*, at 245, 252 (quoting Bentham). Blessed in equal measure with far-sight and insight, Justice Holmes came close to anticipating the concept of bounded rationality when he noted that lawmakers tend to imitate their predecessors:

Most of the things we do, we do for no better reason than that our fathers have done them . . . and the same is true of a larger part than we suspect of what we think. The reason is a good one, because our short life gives us no time for a better, but it is not the best.

Holmes, *supra* note 261, at 468. And in the twentieth century, the American Legal Realists became interested in psychology and human fallibility as affecting the decision-making processes of judges. In this regard, see JEROME FRANK, *LAW AND THE MODERN MIND* 100–17 (1930) (observing that “judges are not a distinct race and . . . their judging processes must be substantially of like kind with those of other men . . .”). Charles Lindblom has applied insights on the limits of human intellectual capabilities more generally to the behavior of public administrators and policy analysts. See DAVID BRAYBROOKE & CHARLES E. LINDBLOM, *A STRATEGY OF DECISION* (1963); Charles E. Lindblom, *Policy Analysis*, 48 AM. ECON. REV. 298 (1958); Charles E. Lindblom, *The Science of “Muddling Through,”* 19 PUB. ADMIN. REV. 79 (1959) [hereinafter Lindblom, *Muddling Through*].

discipline. Roman law had its Gaius, English law its Bracton and its Blackstone, American law its Chancellor Kent. Having methodically trudged across the law's many vineyards, these thinkers could invest their scholarship with a breadth of vision born of the long march.<sup>280</sup> Their insight—and their endurance—was impressive, but not preternatural.<sup>281</sup> And even if the steady complication of rulemaking has rendered it all but impossible for today's jurists to follow in their footsteps, traversing the whole of modern law, such a feat is rather more than our situation demands.<sup>282</sup> Lawmakers need not be one-man

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<sup>280</sup> Blackstone, for one, perceived structural interconnections between different segments of the law with notable acuity. He expressed repeated concern for the "symmetry" or "uniformity" of the law and for the "connexions" within it. *E.g.*, 1 BLACKSTONE, *supra* note 26, at \*10, \*35; 2 *id.* at \*128, \*376; 3 *id.* at \*267, \*269, \*271; 4 *id.* at \*443; *Perrin v. Blake* (Ex. Ch. 1772) (Blackstone, J.), *reprinted in* HARGRAVE, *supra* note 198, at 487, 498; *see also* BOORSTIN, *supra* note 251, at 85–105 (on Blackstone's aesthetics). On Chancellor Kent's perspicacity, *see infra* notes 287, 289; *see generally* David W. Raack, "To Preserve the Best Fruits": The Legal Thought of Chancellor James Kent, 33 AM. J. LEGAL HIST. 320 (1989); Carl F. Sychin, *The Commentaries of Chancellor James Kent and the Development of an American Common Law*, 37 AM. J. LEGAL HIST. 440 (1993). Justice Holmes, author of another classic treatise on the sum and substance of the common law, had likewise "tried to see the law as an organic whole." Oliver Wendell Holmes, Address (Dec. 3, 1902) in 3 THE COLLECTED WORKS OF JUSTICE HOLMES 535, 536 (Sheldon M. Novick ed., 1995); *cf.* HOLMES, *supra* note 242, at 1, 36. Still another (often forgotten) figure on the stage of early American law developed a similar global vision upon assembling the first systematic course of legal studies in the United States. David Hoffman urged his students that "the Law . . . would assume no small degree of interest . . . were [they] initiated, so to speak, in its *geography*; were [they] instructed in the nice connexions and dependencies which unite its many minute divisions, and conduct [them] naturally and easily from one topic to another . . . ." HOFFMAN, *supra* note 242, xviii. Hoffman added, in a passage that will be sadly unusual to the student reader of today, that "[t]hese minute connexions, this natural order and arrangement, it was the aim of the author . . . to exhibit in the following pages." *Id.*

<sup>281</sup> Recent cognitive research suggests that, when they put their minds to it, human persons can set aside reductionistic methods of analysis and tackle problems thoroughly. They then engage in *systematic processing*, in contradistinction to *heuristic processing*. In order to do so, however, persons must be suitably motivated and have the luxury of ample time. Systematic processing is most likely to ensue within highly competitive markets, where any diminishment of rationality is sharply punished. *See* Carol T. Kulik & Elissa L. Perry, *Heuristic Processing in Organizational Judgments*, in APPLICATIONS OF HEURISTICS AND BIASES TO SOCIAL ISSUES 185 (Linda Heath et al. eds., 1994); Robert Cooter, *Law and Unified Social Theory*, 22 J.L. & SOC'Y 50, 55 (1995) (using different terminology). Lawmaking would not appear to present such pressures; still, Blackstone and his fellow travellers do seem to have been systematic processors, not heuristic processors.

<sup>282</sup> Blackstone thought otherwise: "[W]ithout contemplating the whole fabric together, it is impossible to form any clear idea of the meaning and connection of those disjointed



bands, with a single intellect shouldering all of the responsibility. By collaborating, jurists can extend the bounds of individual rationality.<sup>283</sup> And as a practical matter, even a team effort need not strive to turn every stone along the law's path. If our aim is simply to unearth oversights of policy, most of these can be brought to light by throwing individual doctrines into "regional," as opposed to microscopic, relief. The more lawmakers widen the radius of their search, the less likely they are to stumble upon congruent policies.<sup>284</sup> Barring, then, the comprehensive *tour d'horizon*, now understandably an enterprise too heroic to contemplate,<sup>285</sup> jurists can cope by cutting swaths

parts, which . . . form . . . the modern law . . . ." 3 BLACKSTONE, *supra* note 26, at \*196. *But cf.* Langbein, *supra* note 272, at 593 (asserting that the comprehensive text, when produced once, "[does] not bear repeating. . . . Breadth is the enemy of depth, and when breadth is no longer needed, depth will prevail."). My own plea, as discussed hereafter, is for policy analysis conducted at a level somewhere in between these extremes.

<sup>283</sup> "[I]t is now clear that the elaborate organizations that human beings have constructed in the modern world to carry out the work of . . . government can only be understood as machinery for coping with the limits of man's abilities to comprehend and compute in the face of complexity . . . ." Herbert A. Simon, *Rational Decision Making in Business Organizations*, 69 AM. ECON. REV. 493, 501 (1979), *reprinted in* 2 SIMON, MODELS, *supra* note 275, at 474; SIMON, REASON, *supra* note 275, at 87-88. On the other hand, even group-thought often displays bounded rationality writ large. *See* SIMON, REASON, *supra* note 275, at 79-87. One difficulty is the incentive individual members of a group have to free-ride off the cognitive efforts of their fellows, a phenomenon known in the psychological literature as *social loafing*, which, *inter alia*, "might prevent optimal coordination of team members' efforts." Gary J. Miller, *Managerial Dilemmas: Political Leadership in Hierarchies*, in *THE LIMITS OF RATIONALITY* 324, 327-28 (Karen Schweers Cook & Margaret Levi eds., 1990).

The modern technology of artificial intelligence may also provide means of transcending human limitations on powers of cognition. *See* SIMON, REASON, *supra* note 275, at 91-92. *But cf.* Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CAL. L. REV. 15, 26-27 (1987) (suggesting that the new tools of computer research are pushing law *farther* in the direction of atomization).

<sup>284</sup> In actual fact, the environment in which we live, in which all creatures live, is an environment that is nearly factorable into separate problems . . . . We live in what might be called a nearly empty world . . . . Perhaps there is actually a very dense network of interconnections in the world, but in most of the situations we face we can detect only a modest number of variables or considerations that dominate.

SIMON, REASON, *supra* note 275, at 19-20. For a more formal discussion, see Herbert A. Simon, *Rational Choice and the Structure of the Environment*, 63 PSYCHOL. REV. 129 (1956), *reprinted in* SIMON, MODELS, *supra* note 275, at 259.

<sup>285</sup> As Professor Friedman remarks, no modern writer has "dared" to restate the whole of American law. *See* FRIEDMAN, *supra* note 272, at 624. Arthur Leff was making a stab at it (albeit along a zigzag path) but died before he could complete his summa, the *Leff*

through the jungle. All that is required is that they plot their course with some strategic sense of direction.<sup>286</sup> To the extent lawmakers are failing to undertake even this much, we may justly scold them for unwarranted timidity.

From an institutional perspective, what needs to be done? One useful tactic would be for lawmakers to restrain so much as possible the proliferation of categories and doctrines within the law, say, by fusing them together in codes and restatements. Were symmetrical categories and doctrines joined, courts would have no trouble spotting their intra-connection; it is only when the Siamese-doctrines are severed that they may wander off in different directions. Specific suggestions along these lines have been offered by various scholars, in fact for quite some time,<sup>287</sup> and it was this insight that inspired the drafters of

*Dictionary of Law*. Even so, his aim in that project was more modest: to "know all of law—one micron deep." Susan Z. Leff, *Some Notes About Art's Dictionary*, 94 YALE L.J. 1850, 1850 (1985). See also 2 AUSTIN, *supra* note 28, at 1024 (noting the infeasibility of mastering all of English law even in the nineteenth century).

<sup>286</sup> Under the constraints of bounded rationality, "[s]earch is partly random, but in effective problem-solving it is not blind. The design of the search process is itself often an object of rational decision." JAMES G. MARCH & HERBERT A. SIMON, *ORGANIZATIONS* 140 (1958). With respect to inheritance law, the adjoining fields of property and contract offer the richest quarries for structural analogies and hence ought to be the first ones mined by the policy analyst.

<sup>287</sup> Grant Gilmore, for example, suggested uniting quasi-contract with promissory estoppel—and more generally contract with tort—as a means of reconciling doctrinal disparities. But, he added glumly, "the legal mind has always preferred multiplication to division." GRANT GILMORE, *THE DEATH OF CONTRACT* 88-90 (1974). As early as the 1820s, Chancellor Kent espoused the condensation of future interests:

It appears to be wise to abolish the technical distinctions between contingent remainders, springing or secondary uses, and executory devises, for they serve greatly to perplex and obscure the subject. It contributes to the simplicity, and uniformity, and certainty of the law, to bring those various executory interests nearer together, and resolve them in a few plain principles.

4 KENT, *supra* note 172, at 266 n.c; for some subsequent echoes, see J.J. Dukeminier, Jr., *Contingent Remainders and Executory Interests: A Requiem for the Distinction*, 43 MINN. L. REV. 13 (1958) (see also *id.* at 52-55 for a discussion of other jurisprudential costs and benefits of simplification); Lawrence W. Waggoner, *Reformulating the Structure of Estates: A Proposal for Legislative Action*, 85 HARV. L. REV. 729 (1972). A bit later in the nineteenth century, the Boston attorney Francis Hilliard began what proved a successful bid to bind several writs into the single category of *tort* by producing the first treatise devoted to the subject. Urged Hilliard,

I have . . . evolved a series of principles, far less fragmentary and disconnected, than

Article 9 of the Uniform Commercial Code to merge the sundry security interests of old into a single new security device.<sup>288</sup> Such is a useful way (literally) to consolidate the victory, once an apt analogy has been described. Still, it is left to lawmakers initially to ferret out the analogies, to identify those categories and doctrines that have become needlessly balkanized; obviously, it would not do to collapse them pell-mell, for many of them draw efficacious distinctions of which categorical amalgamation might lead us to lose sight.<sup>289</sup>

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they have always appeared to me when stated in connection with mere forms of action. . . . From the very nature of these topics it may be inferred, and upon examination will be found, that they involve principles of great comprehensiveness . . . not requiring to be disconnectedly set forth . . . . I have myself been surprised to find, for example, how many general principles are common to the great *trio* of remedies, *trespass*, *case*, and *trover*. . . .

1 FRANCIS HILLIARD, *THE LAW OF TORTS OR PRIVATE WRONGS* at vii-viii (Boston, Little, Brown 1859). On the crystallization of tort into a legal category, see also G. Edward White, *The Intellectual Origins of Torts in America*, 86 YALE L.J. 671 (1977). For still another early effort to unify a category out of previously separate strands as "a gain to clear thought," see JOHN CHIPMAN GRAY, *RESTRAINTS ON THE ALIENATION OF PROPERTY* § 7 (1st ed. Boston, Soule & Bugbee 1883); see also GRAY, *supra* note 1, § 782 (generally advocating legal simplification).

<sup>288</sup> See 1 GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* §§ 9.1-.2 (1965); Gilmore, *Confessions*, *supra* note 237, at 620. Within the field of inheritance law, the jumble of existing will substitutes is ripe for such a merger. See *supra* note 39.

<sup>289</sup> This is the opposite side of the coin, well illustrated by the so-called fallacy of the transplanted category. See *supra* note 3, and accompanying text. Chancellor Kent, who favored compression of future interests (see *supra* note 287), was more wary of compressing the whole of real property law, which he felt needed to preserve many of its refinements. See 4 KENT, *supra* note 172, at 345-47. More recently, noting the danger of reducing fiduciary law into a single category, see Frankel, *supra* note 3, at 796-97 ("a general theory might offer a temptation to force all fiduciaries into a theoretical straitjacket, thus sacrificing the flexibility of a more particularized approach"). Yet, the true categorical dilemma arises when we identify legal doctrines that raise *related, but not identical*, policy considerations. Here, it would seem, collecting the doctrines under a single, general heading is at once salvation and curse: on the one hand, helping to call attention to policy similarities, and on the other tending to distract attention from policy differences. The decision to widen or restrict the scope of the "fiduciary" category may well raise such a tension. *But cf.* Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897 (advocating expansion of this category). More generally on the costs and benefits of legal categorization, see DWORKIN, *LAW'S EMPIRE*, *supra* note 243, at 250-54; Cohen & Hutchinson, *supra* note 239, at 20-29, 53-54; Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661 (1989); Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 131-37 (1970); Roscoe Pound, *Classification of Law*, 37 HARV. L. REV. 933, 944 (1924). For

As always, a careful consideration of substance should dictate form, for form, alas, is not without influence of its own.

Codification (whatever its other legion of virtues and vices, which has been much debated) in itself presents a golden opportunity for structural coordination, at least within its substantive dimensions.<sup>290</sup> Because a code is assembled in one fell swoop, rather than bit by bit, its drafters stand in a position to look down upon their work as a structural whole, to apply policies where broadly (or narrowly) applicable, and to do so systematically. Judges, who sit rather than stand, obviously occupy a different position. The chance thus presented to harmonize law was one of the virtues of codification extolled by its nineteenth-century advocates.<sup>291</sup>

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further discussions of my own, see Hirsch, *Inheritance and Bankruptcy*, *supra* note 63, at 247-48; Hirsch, *Insolvent Heir*, *supra* note 63, at 652-54. For discussions of the psychology and epistemology of categorization, see *supra* note 274.

<sup>290</sup> Of course, a comprehensive code, in the manner of the civil law, knows no bounds; the broader the coverage, the greater the opportunity for coordination. See also *infra* note 291.

<sup>291</sup> *E.g.*, Jeremy Bentham:

Law, blundered out by a set of men, who,—their course of operation not being at their own command, but at the command of the plaintiffs in the several causes,—were . . . completely destitute of the *power* . . . to operate in pursuit of . . . any comprehensive and consistent plan, good or bad, . . . and which accordingly never has been, nor . . . ever can be, the result of *antecedent* reflection, grounded on a *general* view of the nature of each case, . . . or the analogous cases connected with it: nor, in a word, anything better than a shapeless heap of odds and ends . . .

Letter from Jeremy Bentham to President James Madison (Oct., 1811), in 4 THE WORKS OF JEREMY BENTHAM 453, 459 (John Bowring ed., photo. reprint 1962) (1843) [hereinafter WORKS]. A code, by contrast, offered the advantages of "*consistency* in design, and *uniformity* of expression." Letter from Jeremy Bentham to the Citizens of the several American United States (July, 1817), in 4 *id.* at 478, 494. Likewise, John Austin: "And which, I would ask, is the most likely to be bulky and inconsistent: A system of rules formed together, and made on a comprehensive survey of the whole field of law? or a *congeries* of decisions made one at a time, and in the hurry of judicial business?" The drafters of a code can "construct every rule as that it may harmonise with the rest." 2 AUSTIN, *supra* note 28, at 660, 665-66, 672 (quotations at 665-66); by the same token, pointedly, Austin objected to "bit-by-bit" codification as leading to disharmony between the bits. "It seems to me that codification carried on in this manner (and which, I know not why, has gotten to itself the honourable name of practical), is far more rash than any conceivable scheme of all-comprehensive codification . . . ." *Id.* at 1094-95; see also *infra* note 298. American advocates of codification parroted these themes. *E.g.*, DAVID D. FIELD, *Codification of the Law* (Nov. 28, 1870), in 1 FIELD PAPERS, *supra* note 273, at 349, 350-

Yet here too, wrenches can find their way into the creative machinery. One difficulty is the political constraints under which drafters of a code typically operate. Codes are not enacted *ab nihilo*. New laws inevitably supersede old ones, and in a democracy changes of rules and policies tend to unfold incrementally; radical deviation from past practices is rarely palatable politically. Continuity matters, and the preservation of inconsistencies of policy is a price society willingly pays for that end. The drafter who would presume systematically to harmonize the substance of a code risks losing political support simply by virtue of the magnitude, quite apart from the merits, of the legal changes such a code would comprehend.<sup>292</sup> The drafters of the Uniform Probate Code appear to have been sensitive to this reality.<sup>293</sup>

Along with the political dislocation that it entails, legal reform can also exact significant economic costs. The very fact that a rule *exists*, even if it is structurally inconsistent with another rule, or for that matter is intrinsically sub-optimal, in itself can justify its perpetuation when persons have already acted on the assumption that the rule is in force. In other words, legal mandates can engender *path dependence* (to borrow a concept from stochastic theory): rules can be self-reinforcing, to the extent that they occasion expensive social reliance.<sup>294</sup> In the context of inheritance, for instance, such costs can be

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53 ("Our law is in a state of chaos."); DAVID D. FIELD, *Reasons for the Adoption of the Codes* (Feb. 19, 1873), in 1 FIELD PAPERS, *supra* note 273, at 361, 363-64, 372.

<sup>292</sup> Professor Lindblom noted the phenomenon in connection with policy analysis in general:

It is a matter of common observation that in Western democracies public administrators and policy analysts in general do largely limit their analyses to incremental or marginal differences in policies that are chosen to differ only incrementally. They do not do so, however, solely because they desperately need some way to simplify their problems; they also do so in order to be relevant. Democracies change their policies almost entirely through incremental adjustments. Policy does not move in leaps and bounds.

Lindblom, *Muddling Through*, *supra* note 279, at 84-85; see also BRAYBROOKE & LINDBLOM, *supra* note 279, at 73. For an early discussion, see THE FEDERALIST, *supra* note 185, no. 44, at 282-83 (James Madison). Noting political resistance to reform in the area of inheritance law, see Gaubatz, *supra* note 4, at 515-16, 541.

<sup>293</sup> See *supra* note 129; see also, e.g., UNIF. PROBATE CODE, *supra* note 5, § 2-503 cmt. (taking pains to assert legislative precedents for the "dispensing power," discussed *supra* note 33 and accompanying text).

<sup>294</sup> On the phenomenon of path dependence (which can arise in inorganic-chemical, biological, and economic systems), see generally W. BRIAN ARTHUR, *INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY* (1994). Discussing path dependence in connection with legal systems, see Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641 (1996) (looking to the law of corporate governance for illustrations). I

substantial. A departure from prevailing rules could necessitate the review and revision of every preexisting will executed in their light. In such a case, the game of reform may not be worth the candle.<sup>295</sup> On reflection, the would-be systematizer of legal rules may be better advised to leave well enough alone.

The task of legal harmonization also faces obstacles posed by social dynamics. Assembling a code takes longer than drafting individual statutes. Yet society evolves at its own relentless pace, refusing to wait for lawmakers to catch up. By the time the laborious exercise of drafting a code is done, it may already be nearing obsolescence.<sup>296</sup> In short order, then, the typical code will need to be decorated with amendments. But these often have to be added piecemeal, on the spur of the moment, if further obsolescence is to be avoided. Once again, the door will be open to thoughtless inconsistency.<sup>297</sup> Codifiers

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would add that path dependence is not a *necessary* attribute of a legal system, for one can imagine a regime of dispute resolution in which all issues are continuously judged *de novo*. But a system giving its citizens the opportunity for social reliance—that is to say, a system that *allows* them to depend upon a path—operates to their great benefit, for then and only then can they set about rationally planning their affairs. That, of course, is one of the traditional justifications for the principle of precedent, whereby rules are blazed across the legal landscape. See *supra* note 246 and *infra* note 303. Hence, although path dependence has its costs, these plainly are incomparable to the alternative costs of pathlessness.

<sup>295</sup> See *Delaware Trust Co. v. Delaware Trust Co.*, 95 A.2d 569, 575–76 (Del. Ch. 1953) (declining to correct a misapplication of the rule against perpetuities in a prior decision “because of the apparent reliance placed upon it by the Bar over a great many years in drawing wills”); *Wasserman v. Cohen*, 606 N.E.2d 901, 903 (Mass. 1993) (“When we consider the myriad of instruments drafted in reliance on [the identity theory of ademption], we conclude that stability in the field of trusts and estates requires that we continue the doctrine.”); see also *supra* note 88. Professor Ascher has criticized changes contained within the revised Uniform Probate Code on this basis. See Ascher, *supra* note 224, at 642–43, 648, 651–54, 657; see also Gaubatz, *supra* note 4, at 515–16. Down in the trenches, estate planners are cognizant of the problem. See Timothy V. Barnhart, *Updating Estate Plans: A Structured Review*, 10 PROB. & PROP., Jan.–Feb. 1996, at 15.

<sup>296</sup> In the opinion of one of its authors, the Uniform Commercial Code was “out of date by the time it [was] enacted.” Gilmore, *Confessions*, *supra* note 237, at 627. The problem is most acute in connection with rules whose applications are affected by or responsive to technology, which often evolves rapidly. For a brief discussion, see Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 993–94 (1995). By contrast, inheritance law has responded principally to changes in family patterns (see UNIF. PROBATE CODE, *supra* note 5, art. 2, prefatory note), which tend to move at more of a snail’s pace; in this context, as a result, the problem appears less salient.

<sup>297</sup> Such piecemeal revision has led to inconsistencies within the federal Bankruptcy Code. See Linda J. Rusch, *Unintended Consequences of Unthinking Tinkering: The 1994 Amendments and the Chapter 11 Process*, 69 AM. BANKR. L.J. 349 (1995). Likewise within the Uniform Commercial Code, compare U.C.C. § 9-301(2) (1994) with U.C.C. § 9-312(4)

who took a *continuously* systematic approach to legal change would be hard pressed to keep in step with the ever-changing times.

Then there is the problem of coordinating the efforts of the code-drafting body itself. Certainly, it did not help that the Uniform Commercial Code was split into separate articles, each under the charge of a separate reporter.<sup>298</sup> But aggregation of organizational responsibility is not enough: the Uniform Probate Code, still littered with inconsistencies,<sup>299</sup> was largely spared from the plight of administrative fracturing<sup>300</sup> (though perhaps was tugged at by the centrifugal forces of a procession of review panels<sup>301</sup>). Aggregation of responsibility could

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(1994). These two sections were symmetrical under the original, 1952 Official Draft of the U.C.C. Since then, however, § 9-312 has been amended twice. The history is noted briefly in JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 24-5, at 1148-49 (3d ed. 1988).

<sup>298</sup> Grant Gilmore allowed that "[o]ne of the sad truths about the Code is that its several articles were never coordinated as they should have been. The lack of coordination between article 2 on sales and article 9 on secured transactions is glaringly evident." Gilmore, *Confessions*, *supra* note 237, at 628. Jeremy Bentham anticipated such difficulties. *See infra* note 302.

<sup>299</sup> Substantive asymmetries within the Uniform Probate Code have been noted at various points in this Article. *See supra* notes 42, 59, 76, 91, 115-17, 139-42, 209, 227, 233 and accompanying text.

<sup>300</sup> The original version of the Uniform Probate Code was produced by a single drafting committee. The task of revising the Code in 1990 was allotted to two committees, one responsible for the substantive Article 2 and the other for Article 6 (dealing with nonprobate transfers), although membership of the two committees overlapped. *See UNIF. PROBATE CODE*, *supra* note 5, at 39-41, 458-59 (listing the committees' respective memberships). Though the division of responsibility for drafting the Uniform Probate Code has not played havoc with consistency in anything like the manner of the Uniform Commercial Code, instances of inconsistency stemming from that division can nonetheless be identified. For example, most "time ambiguities," discussed *supra* Part III.C., are covered by Article II of the Code. When it was reformulated in 1990, Article II was altered to permit recourse to extrinsic evidence to clarify all time ambiguities falling within its ambit. *See UNIF. PROBATE CODE*, *supra* note 5, § 2-601. Yet one time ambiguity—the problem of abatement—has from the start been arbitrarily classed in the procedural Article III of the Code, which was *not* revised in 1990. Therefore, inconsistently, extrinsic evidence remains *inadmissible* to clarify the testator's intentions concerning how to abate her estate under the revised Code. *See id.* § 3-902 & cmt. (not explicitly barring extrinsic evidence, but mandating that intent to deviate from the statutory scheme of abatement must be either "express or implied" by the terms of the estate plan).

<sup>301</sup> For an early recognition of this danger, see Sugden, *supra* note 31, at 5-6. *But see* Averill, *supra* note 117, at 904-06 (urging additional review cycles, on the "theory . . . that the more persons to review a draft, the better the finished product will be"); John H. Langbein & Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871, 877 (1992) (suggesting that the Uniform

even backfire if carried too far; too few cooks can also ruin the broth when the recipe is long and complicated. As we have noted, collaborative labor may be all but essential; a solitary drafter, groaning under the production of a full-fledged code, would soon fall back on less thoughtful, more mechanical or derivative, drafting procedures.<sup>302</sup> Courts, of course, have often succumbed to

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Probate Code benefitted from numerous cycles of review). At the same time, Langbein and Waggoner add, "when helping hands materialize and the proposed uniform acts come under deliberation in state bar association committees and in committees of the state legislature, there is sometimes a disposition to tinker in ways that are ill considered." Langbein & Waggoner, *supra*, at 878; anticipating this problem, see DAVID D. FIELD, *Codification of the Law*, in 1 FIELD PAPERS, *supra* note 273, at 363-64. Alas, cannot the same difficulty arise within the initial review-cycle process? I have recounted one illustration of the potential pitfalls of the review process for codes (in this instance, the federal Bankruptcy Code) in Hirsch, *Inheritance and Bankruptcy*, *supra* note 63, at 242 & n.226. For another, see Leff, *supra* note 175. For discussions of the problem as it pertains to the maintenance of geographical uniformity, see Grant Gilmore, *Commercial Law in the United States: Its Codification and Other Misadventures*, in ASPECTS OF COMPARATIVE COMMERCIAL LAW 449, 461-62 (Jacob S. Ziegel & William F. Foster eds., 1969); Langbein & Waggoner, *supra*, at 878-79.

<sup>302</sup> The issue has been a point of debate among codification advocates. Jeremy Bentham recommended lodging the drafting process in a single pair of hands, *inter alia*, for purposes of ensuring harmony:

[T]wo, or any greater number of workmen, all equal in good intention and skill . . . , but taking each one of them a different part of the work, will not render it so well adapted to that same end as any one of them would . . . . Want of consistency in the workmanship, is the cause of the inferiority in this case.

Jeremy Bentham, *Codification Proposal, Addressed By Jeremy Bentham to All Nations Professing Liberal Opinions* (1822), in 4 WORKS, *supra* note 291, at 535, 555, 558-59 (see generally 554-59) (quotation at 555). (Ever the enthusiast, Bentham proposed to take on this task himself: in a series of formal proposals, he offered, gratis, to produce a comprehensive code of laws for the federal government of the United States or any individual states that would engage him. Several governors expressed interest, but the War of 1812 and other circumstances conspired against him, and the *lex Bentham* never reached our shores. The relevant correspondence appears in 4 *id.* at 451-533, and the story is further elaborated in COOK, *supra* note 273, at 97-104.) By contrast, John Austin, recognizing the practical difficulties, urged the modern committee approach: "the code cannot possibly be made by one mind; . . . [but] if produced by a number of persons working in concert, . . . [s]uch a set of persons would be in a much more favourable position for producing a homogeneous and consecutive whole than persons working in a disjointed and unconnected manner." 2 AUSTIN, *supra* note 28, at 677, 1024, 1093-94 (quotation at 677). But at the extreme, Blackstone recognized that a full-fledged legislature, crowded with "discordant opinions," was unequal to the task of developing "a uniform[] plan of justice." 3 BLACKSTONE, *supra*



analogous burdens of case-load, and their resort to analytical short-cuts is a part of our problem.<sup>303</sup> *Rigor juris* and *rigor æquitas* are old adversaries; *rigor redactor* would be one too many.

All of these impediments to structural consistency, even within a code, are real enough. But they do not alone suffice to explain the level of disharmony found within the modern codes. What appears to be missing from many of today's code-drafting processes, however organized, is a fundamental and deliberate *alertness* to the problem at hand.<sup>304</sup> Such a want of consciousness—not to say conscientiousness—is one of the Uniform Probate Code's signal characteristics, despite its many substantive achievements. Commentary accompanying the Code offers scant evidence that its various sections were ever subjected to any sort of methodical, comparative analysis.<sup>305</sup> With this end

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note 26, at \*267.

<sup>303</sup> That the press of judicial business can turn legists into legalists is well enough known. Formalistic reliance on precedent is itself a judicial heuristic employed to streamline the adjudicative process (though, of course, it serves other social and moral functions as well). For some recent critiques, see Lea Brilmayer, *Wobble, or the Death of Error*, 59 S. CAL. L. REV. 363 (1986); John E. Coons, *Consistency*, 75 CAL. L. REV. 59 (1987); Hirsch, *Insolvent Heir*, *supra* note 63, at 252–53; Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987) (see especially 599–601); and early on, see BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 142–67 (1921) (see especially 144–50); Holmes, *supra* note 280, at 536; see also *supra* note 246 and accompanying text.

Though adherence to precedent is hardly incompatible with the search for structural consistency—for a formalistic court may cite to *analogous* precedents—the search for *apt* analogies requires at least implicit consideration of policy symmetries and therefore suffers from the same drawback (*i.e.*, consumption of precious time) that hampers policy analysis generally. Hence, it appears likely that a court bent on conserving adjudicative energy will be driven at once in the direction of formalism *and* in the direction of analytical narrowness.

<sup>304</sup> This was not always so. John Austin thus spoke in praise of the ancient jurists: "Each of these writers was master of the Roman law in its full extent; each had the whole of its principles constantly present to his mind . . . ." 2 AUSTIN, *supra* note 28, at 677.

<sup>305</sup> See, *e.g.*, *supra* note 59 (noting the drafters' failure to relate the standard of evidence applicable to proving a holograph to the one applicable to proving a mis-executed will); *supra* note 76, 146 and accompanying text (noting the drafters' failure to relate the formalities required for contracts to make wills to conditional bequests and to the doctrine of incorporation by reference); *supra* note 91 and accompanying text (noting the drafters' failure to relate the doctrine of acts of independent significance to revocation by act); *supra* note 139 and accompanying text (noting the drafters' failure to relate the evidentiary exercise of establishing a holograph and incorporation by reference); *supra* note 209 (pointing out inconsistencies in the rules construing wills executed prior to various types of changes in family circumstances that the drafters never compared in the accompanying comments or in their scholarly commentary); *supra* notes 227, 231 (pointing out

in view, I would urge the drafters of future codes to resolve hereafter to attach a "relation to other rules" comment<sup>306</sup> to each and every section of their handiwork. That would at least set lawmakers to thinking and reading across the lines.

## V. CONCLUSION

Aristophanes was only half-right. *Zeus remains enthroned, but He needs to pay closer attention.*

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inconsistencies between the rules of lapse and ademption, and between the standards of evidence applicable to extrinsic proof of intent to make a will and intent to deviate from rules of construction concerning its substantive contents, that the drafters never compared in the accompanying comments); *supra* note 233 (referring to other random inconsistencies). *But see supra* note 39, for one conspicuous instance in which the Uniform Probate Code has contributed to the intrinsic harmony of inheritance law. In a related vein, the Code also manifests asymmetries of drafting style and format that have aroused criticism. "Unfortunately, this type of inconsistent [format] structure detracts from the argument that the 1990 UPC is a carefully crafted and integrated whole. Such inconsistencies might give the impression that the Code is merely a crazy-quilt of provisions from various jurisdictions and drafters." Averill, *supra* note 117, at 906-10 (quotation at 907).

<sup>306</sup> I borrow the term from RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 61, § 90 cmt. a.